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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 147

**THE STATE OF WEST VIRGINIA, AT THE RELA-
TION OF DR. N. H. DYER, ET AL., ETC., PETI-
TIONERS,**

vs.

**EDGAR B. SIMS, AUDITOR OF THE STATE OF
WEST VIRGINIA**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF
THE STATE OF WEST VIRGINIA**

PETITION FOR CERTIORARI FILED JUNE 26, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

THE STATE OF WEST VIRGINIA, AT THE RELA-
TION OF DR. N. H. DYER, ET AL., ET AL., PETI-
TIONERS,

vs.

EDGAR B. SIMS, AUDITOR OF THE STATE OF
WEST VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 13, 1950.



[fol. 1]

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Mandamus

THE STATE OF WEST VIRGINIA, at the Relation of DR. N. H. DYER and W. W. Jennings, Commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission; D. Jackson Savage, Chairman of the State Water Commission of the State of West Virginia; and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming, and Dr. C. F. McClintic, Members of the State Water Commission, Petitioners,

vs.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent

**APPLICATION FOR WRIT OF MANDAMUS—Filed January 24,
1950**

[fol. 2] To the Honorable, the Judges of the Supreme Court of Appeals of West Virginia:

I

Your petitioners would respectfully represent unto Your Honors that Dr. N. H. Dyer and W. W. Jennings, two of the Petitioners named herein, are the duly appointed, qualified and acting members of the Ohio River Valley Water Sanitation Commission as Commissioners for the State of West Virginia; that D. Jackson Savage, one of the petitioners named herein, is the duly appointed, qualified and acting Chairman of the State Water Commission; and that Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming, and Dr. C. F. McClintic, four of the petitioners named herein, are duly appointed, qualified and acting members of the State Water Commission of the State of West Virginia.

II

Your petitioners further represent unto Your Honors that the Ohio River Valley Water Sanitation Compact was enacted into the law of this State by Chapter 38, Acts of the

West Virginia Legislature, Regular Session, 1939, to become operative after the adoption of said Compact by the States of New York, Pennsylvania, Ohio, and Virginia, and upon execution of the said Compact by the Compact Commissioners; that on June 30, 1948, the Compact was executed by the States of Indiana, West Virginia, Ohio, New York, Illinois, Kentucky, Pennsylvania, and Virginia, through their duly appointed Compact Commissioners; and that said [fol. 3] Compact had previously been approved and authority granted to the States to enter into said compact by the Congress of the United States by Public No. 739—76th Congress, Chapter 581—3rd Session, S. 3617, approved July 11, 1940.

III

Your petitioners further represent unto Your Honors that the State Water Commission of the State of West Virginia was created by Chapter 14 of the Acts of the West Virginia Legislature, Regular Session, 1929, and as amended by Chapter 6 of the Acts of the West Virginia Legislature, Regular Session, 1933, and Chapter 126 of the Acts of the West Virginia Legislature, Regular Session, 1947.

IV

Your petitioners further represent unto Your Honors that the Legislature of the State of West Virginia authorized payment from the general revenue of the State of West Virginia of the sum of \$12,250 as the share of the State of West Virginia in the expenses for the fiscal year of July 1, 1949, to June 30, 1950, of said Ohio River Valley Water Sanitation Commission and that said authorization was given by the Legislature at page 50, Acts of the West Virginia Legislature, Regular Session, 1949, under account number 474 of the budget bill.

V

Your petitioners further represent unto Your Honors that the respondent, Edgar B. Sims, is the duly elected, qualified and acting Auditor of the State of West Virginia, [fol. 4] and as such Auditor is required to issue warrants on the treasury of the State of West Virginia to enable the appropriations of the Legislature to be paid.

VI

Your petitioners further represent unto Your Honors that on August 26, 1949, Dr. N. H. Dyer, one of the petitioners herein, in his capacity as Compact Commissioner, submitted to the respondent a requisition on the form approved by the said respondent, which requested the respondent, as State Auditor, to issue a warrant in the amount of \$12,250.00, payable to the said Ohio River Valley Water Sanitation Commission in accordance with the said appropriation. The respondent refused to honor the requisition so tendered and even though said requisition was resubmitted on November 7, 1949, and on December 22, 1949, the said respondent has refused and still refuses to draw a warrant to pay said appropriation.

VII

Your petitioners further represent unto Your Honors that if the respondent is allowed to refuse payment to the Ohio River Valley Water Commission of the funds appropriated for that purpose by the Legislature that the State of West Virginia cannot remain a participating State in the Compact; that your petitioners, Dr. N. H. Dyer and W. W. Jennings, Compact Commissioners as aforesaid, will be divested of their position as such Commissioners in contravention of the legislative enactments of the West Virginia Legislature and the express approval and execution of such enactments by the Governor of the State of West Virginia; that the Compact Commissioners of said [fol. 5] Compact for the State of West Virginia are specifically given all of the power necessary or incidental to the carrying out of said Compact in every particular, which powers would be denied to your said petitioners by the respondent; that the members of the State Water Commission will no longer have the status of a reciprocating agency of a State participating in the Ohio River Valley Water Sanitation Compact and will lose the benefits of such reciprocation and of such mutual cooperation.

VIII

Your petitioners therefore pray that a writ of mandamus be awarded to your petitioners, directed to the said Edgar B. Sims commanding the said Edgar B. Sims to issue a war-

rant as requested by the petitioner, Dr. N. H. Dyer, payable to the said Ohio River Valley Water Sanitation Commission in accordance with the authorization given by the Legislature, and to that end that a rule may be issued against him commanding him to appear before this Court and show cause, if any he can, why he should not do so; and grant unto your petitioners such other or further relief as the Court may deem proper and as the law may require, and as in duty bound your petitioners will ever pray, etc.

N. H. Dyer, M. D., as Compact Commissioner; W. W. Jennings, as Compact Commissioner; D. Jackson Savage, as Chairman, State Water Commission; N. H. Dyer, M. D., as member State Water Commission; W. W. Jennings, as member State Water Commission; Dan B. Fleming, as member State Water Commission; C. F. McClintic, M. D., as member State Water Commission.

[fol. 6] By Counsel; W. C. Marland, Attorney General; Thomas J. Gillooly, Assistant Attorney General; — — —, Counsel for the Relator; — — —, Counsel for the Relator.

STATE OF WEST VIRGINIA,

County of Kanawha, to-wit:

Dr. N. H. Dyer, one of the petitioners named in the foregoing petition, being first duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be of information, and that, so far as they are therein stated to be on information he believes them to be true.

N. H. Dyer, M. D., Petitioner.

Taken, sworn to and subscribed before me this 18th day of January, 1950 My Commission expires November 30, 1958. Merle Davis, Notary Public.

[File endorsement omitted.]

[fols. 7-8] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA.

RULE TO SHOW CAUSE—January 30, 1950

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 30th day of January, 1950, the following order was made and entered, to-wit:

[Title omitted]

On a former day, to-wit, January 24, 1950, came the State of West Virginia at the relation of Dr. N. H. Dyer and W. W. Jennings, Commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission; D. Jackson Savage, Chairman of the State Water Commission of the State of West Virginia; and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming, and Dr. C. F. Mc Clintic, Members of the State Water Commission, by W. C. Marland, Attorney General, and Thomas Gillooly, Assistant Attorney General, their attorneys, and presented to the Court their petition, together with their memorandum of authority in support thereof, praying for a writ of mandamus to be directed to Edgar B. Sims, Auditor of the State of West Virginia, as therein set forth. Upon consideration whereof, the Court is of opinion that a rule of mandamus should be awarded as prayed for in their said petition.

It is therefore ordered that a rule of mandamus do issue directed to Edgar B. Sims, Auditor of the State of West Virginia, commanding him to appear before this Court at its Court Room in the City of Charleston, County of Kanawha, on the 14th day of February, 1950, at ten o'clock a. m., to show cause, if any he can, why a peremptory writ of mandamus should not be awarded against him as prayed for.

Service of a copy of this order upon the respondent, Edgar B. Sims, Auditor of the State of West Virginia, together with a copy of the petition filed herein, shall have the same effect as the service of a formal rule.

A True Copy.

Attest: (S.) B. B. Jarvis, Clerk Supreme Court of Appeals.

[fol. 9] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE DEMURRER AND ANSWER OF THE RESPONDENT, EDGAR B. SIMS, AUDITOR, TO THE PETITION FILED HERIN—February 14, 1950

THE DEMURRER OF THE RESPONDENT

Respondent, Edgar B. Sims, Auditor of the State of West Virginia, respectfully says that the petition filed herein is insufficient in law for the following reasons:

1. Chapter 38, Acts of the West Virginia Legislature, 1939, which purports to enact the Ohio River Valley Water Sanitation Compact is unconstitutional within the terms of Article X, Sections 3, 4 and 6 of the Constitution of West Virginia; and likewise the appropriation in Acts of the West Virginia Legislature, 1949, under Account No. 474 of the Budget Bill is unconstitutional for the same reason.
2. The petition does not show that the appropriation in question is for a public purpose or, in fact, for what purpose such funds will be used by the Ohio River Valley Water Sanitation Commission.
3. The provisions of the Ohio River Valley Water Sanitation Compact violate Article III, Section 10 of the Constitution of the State of West Virginia and the XIV amendment to the Constitution of the United States.
4. The provisions of the Ohio River Valley Water Sanitation Compact illegally and unconstitutionally purport to delegate police powers of the State of West Virginia to: (1) a corporation which is not a governmental corporation [fol. 10] of the State of West Virginia, (2) individuals who are neither officers nor residents of this State, and (3) such compact purports to grant extra-territorial jurisdiction to the Courts of this and other states, as well as to United States District courts.
5. The Ohio River Valley Water Sanitation Compact purports to bind the State of West Virginia to enact legislation in the future.
6. The title of Chapter 38, Acts of the Legislature, 1939, fails to comply with section 30, Article VI of the Constitution of West Virginia and a large part of said act is void.

Wherefore this respondent prays the judgment of this Honorable Court on his foregoing demurrer to the end that it may be sustained and this proceeding dismissed.

Edgar B. Sims, Auditor, by Charles C. Wise, Counsel for Respondent

ANSWER OF THE RESPONDENT

In answer to the petition filed herein, respondent respectfully says:

I. It is true that the petitioners, Dr. N. H. Dyer and W. W. Jennings, are purporting to act as members of the Ohio River Valley Water Sanitation Commission as Commissioners for the State of West Virginia and that the other petitioners are the chairman and members, respectively, of the State Water Commission of the State of West Virginia.

[fol. 11] II. The Ohio River Valley Water Sanitation Compact was purported to be enacted into law by Chapter 38, Acts of the West Virginia Legislature, 1939, as is in the petition alleged, but this respondent denies the validity and constitutionality thereof. The other allegations found in paragraph II of the petition are true.

III. The allegations contained in paragraph III of the petition are true.

IV. Respondent says that the allegations contained in paragraph IV of the petition are true, except that he specifically denies the validity and constitutionality of the alleged appropriation.

V. The allegations contained in paragraph V of the petition are true, but respondent says that he is under no duty to issue warrants on the State of West Virginia to pay illegal, unauthorized and unconstitutional appropriations of the legislature and that it would be in violation of his oath of office to support the constitution of this state, to pay the alleged appropriation involved in this proceeding, as he verily believes.

VI. The allegations contained in paragraph VI of the petition are substantially true as therein alleged.

Respondent says that some of his reasons for refusing to draw a warrant payable to the Ohio River Valley Water Sanitation Commission are contained in his letter dated

December 22, 1949, to petitioner, N. H. Dyer, a copy of which is attached hereto and made a part of this answer.

[fol. 12] VII. Respondent is without information as to the truth of the allegation that if the funds in question are not paid to the Ohio River Valley Water Sanitation Commission that the State of West Virginia can not remain a participating state in the Compact; but, upon information and belief, respondent says that the Ohio River Valley Water Sanitation Commission has established expensive offices in the City of Cincinnati, Ohio, has employed a chairman who is paid an annual salary far in excess of that of the Governor of the State of West Virginia, and that other personnel of the commission are paid exorbitant salaries, and that it would appear to respondent from a reading of the Compact and information which has come to him that one of the significant features of the commission is the establishment of an office and employment of personnel which now and hereafter will require substantial funds; respondent admits that petitioners, Dr. N. H. Dyer and W. W. Jennings, who are now purporting to act as Compact Commissioners, will be divested of their respective positions, if, as he verily believes, the Compact and the act of the Legislature in enacting it are illegal, unlawful and unconstitutional; respondent denies that the Compact Commissioners for the State of West Virginia are vested by such Compact with all the powers necessary or incidental to the carrying out of said Compact in every particular, as in the petition alleged, and respondent affirmatively says such Compact is unlawful and unconstitutional for reasons heretofore assigned; respondent is without information as to the truth of the allegation that the members of the State Water Commission will no longer have the status of a reciprocating agency of a state participating in the Compact, but respondent says that the State Water Commission of the State of West Virginia, which has been established for many years, is lawfully and legally authorized and empowered to accomplish each [fol. 13] and all the purposes of the Compact in question and that as far as he is informed and advised there is no reason why the State Water Commission can not cooperate lawfully and legally with the Ohio River Valley Water Sanitation Commission or the commissions of any of the states interested or concerned in the condition of the water of the Ohio River.

VIII. Having answered the petition filed herein in every particular, this respondent denies that he is under any duty or obligation to issue a warrant as requested by the petitioners, payable to the Ohio River Valley Water Sanitation Commission, but on the contrary says that such action would be unlawful and unconstitutional and, accordingly, respondent prays that the petition for a writ of mandamus may be dismissed and he may be hence discharged.

Edgar B. Sims, Respondent.

Charles C. Wise, Counsel for Respondent.

[fol. 14] *Duly sworn to by Edgar B. Sims. Jurat omitted in printing.*

[fol. 15]

EXHIBIT TO ANSWER

State of West Virginia, Auditor's Office
Charleston

Edgar B. Sims, Auditor; Milton S. Koslow, Chief Clerk

December 30, 1949.

The Honorable N. H. Dyer, M. D., Member, State Water Commission, State Capitol, Charleston 5, West Virginia.

DEAR DR. DYER:

I am again returning herewith your Requisition No. 14, drawn on Account No. 4746, designated "West Virginia's Contribution—Ohio River Valley Water Sanitation Commission," to be paid out of General Revenue, in the amount of \$12,250.00. The legislative appropriation upon which this requisition is based seems to be in conflict with Article 10, Section 6, of our State Constitution, which forbids the State from granting its credit to, or assuming the liability of, any county, city, township, corporation, or person, or becoming a joint owner or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever. The State Constitution clearly forbids the assumption of obligations and joint participation set forth in this Compact.

On reading the Compact of the Ohio River Valley Water Sanitation Commission, it would seem that the State is obli-

gated to make continuing and possibly ever-increasing appropriations upon the recommendation of the members of this Commission, seven-eighths of whom are non-residents of the State, the headquarters or main offices being domiciled in Cincinnati, Ohio. This is an unconstitutional assumption by the State of the obligations of an extra-State association. Furthermore, the Compact even goes to the extent of binding future legislatures by agreeing to enact legislation to carry out the purposes of this Commission and agreeing to make appropriations for its support. This, apparently, would obligate the Board of Public Works to recommend to the Legislature any appropriations requested by said Commission. Furthermore, an appropriation would be tantamount to the Legislature contributing to an alien commission to come in and lobby for large gifts to effectuate its purpose.

It is also conceivable that a vote of two thirds or three-fourths of the eight states who are parties to this alleged Compact could outvote the State of West Virginia, and force their will upon the State even though it had voted otherwise. If this Compact is valid and in full force and effect, not only \$12,000, but \$100,000, or possibly \$1,000,000, could be exacted for its support in the future.

[fol. 16] This Compact also attempts to confer jurisdiction and authority upon the Commission in Cincinnati to bring suits in state and federal courts. Can the State of West Virginia abdicate its sovereignty, or transfer it to a non-resident voluntary association? I believe that the State of West Virginia is, and should be, a single sovereign entity, but when it goes into this Compact, it becomes less than an entity—it is one-eighth, and loses its sovereignty.

Again, this Compact does not pretend to do any of the work of water purification, or render any services to the State of West Virginia which it cannot do for itself. Not one-drop of water could it purify, or remove one dead horse from a stream. Nor can it force cities and municipalities of this State to cease contamination of water should they refuse to comply with its orders, nor can it force the citizens to vote bonds for the purpose of purification plants. In my judgment, this Compact borders upon a proprietary organization; operated for the purpose of benefiting the operators. The top officer in Cincinnati draws \$15,000 per year, more than the Governor of this State. The next in line

receives \$8,500 per year, more than other elective officials in this State receive.

We have a State Water Commission in West Virginia for the purpose of working toward the purification of our streams and the stoppage of pollution, not only by cities, but by individuals and corporations as well. This Commission is a State agency, and has the right to do all proper things to accomplish its purpose within the purview of the statute creating it. It can be backed by the power of the courts of this State to assist it in enforcing its rules and regulations. There would be nothing wrong, legally, with the State Water Commission cooperating with commissions of other states. But the State cannot bind itself to do the will and bidding of a super-organization that is not a State agency, and which is domiciled in another State.

As the organization in question is not a State agency, any appropriation made to it, to be spent without accounting, is ~~improper and unconstitutional~~. The present appropriation would turn over the full amount to this commission for expenditure without any accounting or itemization of expenditures as is required by law for money spent from the State treasury. Would it be proper and constitutional for the Legislature to appropriate, say \$300,000 to the State Tax Commissioner, and let him deposit this in his own account in a bank to spend at his own will without accounting? He is a regularly constituted official of the State. Is a voluntary association, domiciled outside of the State, which is not a State agency, to be allowed more liberality in spending State money than a State agency?

It might be noted that we have a Potomac Valley Commission to which an appropriation was also made, I now feel erroneously. We have several other voluntary organizations, or commissions, which are of doubtful constitutionality, and which receive huge appropriations. I think it is high time the courts be called upon to tell us how far we can go in dissipating State funds.

[fol. 17] We already have the Interstate Commission for the Potomac River Basin, and I know that the State of Maryland has created the Monocacy Valley Commission for this branch of the Potomac River. It won't be long until we have someone organizing a Tug River Commission and asking the State for an appropriation to lessen pollution there. Then, we may have an organization of the Great

Kanawha Valley Commission, then there would be one from the Little Kanawha Valley, and still another for the Monongahela Valley. Perhaps we may have one from the Cheat River, and another from Tygart Valley, because we have a lot of people who want jobs, and they can produce exactly the same argument for these last mentioned water commissions that can be urged for the Ohio River Valley Water Sanitation Commission.

If we wish to do progressive things to prevent pollution of our streams, funds will have to be provided in some manner. Certainly this commission in Cincinnati can furnish no funds. They are *asking* for funds. The cities will require hundreds of millions of dollars in this State for purification plants. Individual concerns will also have to spend millions of dollars to prevent contamination of our streams. Just what is the commission in Cincinnati going to do toward furnishing the money, or doing any other thing of any use or benefit to the State of West Virginia, over and above what our State Water Commission can already do?

I realize that my position in the matter may change the plans of the Ohio River Valley Water Sanitation Commission, but I do not feel that I can authorize a warrant to be drawn from State funds in violation of the Constitution I have sworn to support.

Very truly yours, Edgar B. Sims, State Auditor.

EBS:gs. Incl.—Trm. 14.

[fol. 18] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Title omitted]

State of West Virginia:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of February, 1950, the following order was made and entered, to-wit:

ORDER OF SUBMISSION—February 14, 1950

This day came the respondent, Edgar B. Sims, Auditor of the State of West Virginia, by Charles C. Wise, his attorney, and tendered and filed his demurrer and answer to

the petitioners' petition; and came also the petitioners, Dr. N. H. Dyer and W. W. Jennings, Commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission; D. Jackson Savage, Chairman of the State Water Commission of the State of West Virginia; and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming, and Dr. C. F. McClintic, Members of the State Water Commission, by William C. Marland, Attorney General, Thomas J. Gillooly, Assistant Attorney General, John W. Daniel and Leonard A. Weakley, their attorneys; and this proceeding having been fully heard upon the petition, the rule awarded thereon, the demurrer and answer of the respondent to petitioners' petition, and the argument and briefs of counsel thereon, the Court takes time to consider of its judgment.

[fol. 19] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

10254

Mandamus

THE STATE OF WEST VIRGINIA ex Rel., DR. N. H. DYER, et als.,
etc., Petitioners

vs.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent

ORDER DENYING PEREMPTORY WRIT OF MANDAMUS—April
4, 1950

The Court, having maturely considered the petition, the rule awarded thereon, the demurrer and answer of the respondent to petitioners' petition, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that the petitioner is not entitled to the peremptory writ of mandamus prayed for in his said petition. It is therefore considered and ordered by the Court that the peremptory writ of mandamus prayed for in this proceeding, be, and the same is hereby denied and the rule heretofore awarded is discharged.

The syllabus of point's adjudicated, prefixed to the written opinion prepared by Judge Fox, was concurred

in by Judges Lovins and Haymond, Judges Riley and Given dissent and reserve the right to file dissenting opinions.

State of West Virginia:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 12th day of April, 1950, the following order was made and entered, to-wit:

Judge Given today filed a dissenting opinion in this proceeding in which Judge Riley concurred.

[fol. 20]

No. 10254

STATE EX REL. DR. N. H. DYER, et al.

v.

EDGAR B. SIMS, Auditor

Mandamus Writ denied

OPINION—April 4, 1950

Fox, Judge

1. The title of an act of the Legislature which defines the purpose thereof and ends with the phrase "and providing for the carrying out of said compact", provides sufficient index to the purposes of the act, and is not insufficient because it fails to detail the methods by which the act is to be made effective.

2. An act of the Legislature which shows a clear intent to provide for the abatement and control of pollution in the streams of the State, and appropriates public funds to effect the same, will be interpreted as an act and appropriation for a public purpose.

3. The Legislature of this State, in the proper exercise or delegation of the police power of the State, cannot bind future Legislatures in respect to the use of such power.

4. The Legislature of this State does not possess the power to grant or delegate, in perpetuity, the police power

of the State to any public agency of the State, or to an agency, board or commission set up by this State in conjunction with other states and the Government of the United States.

[fol. 21] 5. Under Section 4, Article X, of the Constitution of this State, the Legislature is without power to create an obligation to appropriate funds, for a purpose not mentioned in said section, by future Legislatures. Such legislation, if otherwise valid, would be void under said section, as creating a debt inhibited thereby.

6. Chapter 38, Acts of the Legislature, 1939, purporting to authorize this State to become a party to the Ohio River Valley Water Sanitation Commission is invalid, because the Legislature in enacting the same, and in delegating a part of the police power of the State to the said commission exceeded its legitimate powers; and an act appropriating public funds in the aid of such commission constitutes an unwarranted exercise of legislative power.

[fol. 22] Fox, Judge:

The Legislature of this State, at its 1949 Session, made an appropriation of \$12,250.00 as a contribution to the Ohio River Valley Water Sanitation Commission for each of the two fiscal years, beginning July 1, 1949 and July 1, 1950. A requisition to make such appropriation effective for the current fiscal year was made upon Edgar B. Sims, Auditor of the State of West Virginia, and refused by him. This proceeding in mandamus is instituted in this Court to compel the said auditor to honor the requisition so made.

This proceeding was instituted by the State of West Virginia, at the relation of Dr. N. H. Dyer and W. W. Jennings, commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission; D. Jackson Savage, Chairman of the State Water Commission of West Virginia; and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming and Dr. C. F. McClintic, members of the State Water Commission.

The State Water Commission of the State of West Virginia was created by Chapter 14, Acts of the Legislature, 1929, and by that Act it was provided that such commission should consist of the Commissioner of Health, the Chairman of the Public Service Commission of West Virginia,

and the Chairman of the West Virginia Game and Fish Commission, and their successors in office. The Act was amended by Chapter 6, Acts of the Legislature, Regular Session, 1933; by Chapter 102, Acts of the Legislature, Regular Session, 1945, by which it was provided that the State Water Commission should consist of the Commissioner of Health, the Chairman of the West Virginia Game and Fish [fol. 23] Commission, and their successors in office, and three others to be appointed by the Governor with the advice and consent of the Senate; and further amended, in respect to the definitions contained in Section 1 of the original Act, by Chapter 126, Acts of the Legislature, Regular Session, 1947. Therefore, the State Water Commission, at the date of the institution of this proceeding, was made up of its chairman, D. Jackson Savage, Dr. N. H. Dyer, State Health Commissioner, C. F. McClintic, Chairman of the West Virginia Game and Fish Commission, W. W. Jennings and Dan B. Fleming. The general purpose of the creation of the State Water Commission was to provide against the pollution of the streams of the State, and it would serve no useful purpose to further define the duties of that commission.

By reason of the geographical location of the State of West Virginia and other states, in relation to the Ohio River and its tributaries, a movement was inaugurated as early as 1929, the purpose of which was to promote a compact between the several states whose territories, in whole or in part, were drained by the Ohio River and its tributaries, for the purpose of the abatement and prevention of the pollution thereof. As a result of this movement, what is termed the Ohio River Valley Water Sanitation Compact was prepared for execution by the respective states. The approval of the Congress of the United States, as required by Section 10 of Article I of the Constitution of the United States, was later obtained. To make effective this compact on the part of the State of West Virginia, the Legislature of said State, by Chapter 38, Acts of the Legislature, 1939, enacted a statute, Section 1^o of which reads:

[fol. 24] "The following Ohio River Valley Water Sanitation Compact, which has been negotiated by representatives of the states of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee and West Virginia, is hereby approved, ratified, adopted, enacted

into law, and entered into by the State of West Virginia as a party hereto and signatory state, namely:

Then followed the proposed compact in full. It was provided by the Act aforesaid that the same should take effect and become operative, and the compact to be executed for and on behalf of the State of West Virginia only from and after the approval, ratification, adoption and entering into by the States of New York, Pennsylvania, Ohio and Virginia. It appears from relators' petition filed herein that the said compact was duly executed, by the states last mentioned above and others, on June 30, 1948, and that it had theretofore received the consent of the Congress of the United States to the execution thereof, the form of the compact apparently having been presented to the Congress in advance of its execution by the states.

Section 2 of Chapter 38, Acts of the Legislature, 1939, aforesaid, provides that there should be three members of the Ohio River Valley Water Sanitation Commission from the State of West Virginia, and that the Governor, by and with the advice and consent of the Senate, should appoint two persons as two of such commissioners, each of whom should be a resident and citizen of this State. It then provided that one of the three commissioners from this State should be the Commissioner of Health ex officio, and his successor in office.

Section 3 of the Act provided that:

"There is hereby granted to the commission and commissioners thereof all the powers provided for in the said compact and all the powers necessary or incidental [fol. 25] to the carrying out of said compact in every particular. * * *

"The circuit courts of this State are hereby granted the jurisdiction specified in article nine of said compact, and the attorney general or any other law-enforcing officer of this state is hereby granted the power to institute any action for the enforcement of the orders of the commission as specified in said article nine of the compact."

By Section 5 of the Act it is provided:

" * * * There shall be appropriated to the commission out of any moneys in the state treasury unexpended and available therefor, and not otherwise appropriated, such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportion of the state of West Virginia of the annual budget of the 'Ohio River Valley Water Sanitation Commission' in accordance with article ten of said compact."

It will appear from the foregoing quotations that reference must be had to the terms of the compact proposed to be entered into under the statute aforesaid. The purpose of the compact is stated to be the abatement and control of pollution in said river and its tributaries. Article I of the Act pledges each of the signatory states to faithful co-operation in control of future pollution, and in the abatement of existing pollution from the rivers, streams and waters of the Ohio River basin which flow through, into or border on any of such signatory states; and to make effective such purposes, agreed to enact necessary legislation to enable each such state to place and maintain the waters of said basin in a satisfactory sanitary condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, and suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances [fol. 26] due to floating solids or sludge deposits, and adaptable to such other uses as might be legitimate. Article IV provides that the commission should consist of three commissioners from each state to be selected as the laws of such state might provide, and three commissioners representing the United States to be appointed by the President of the United States, or in such other manner as might be provided by the Congress. Article V provides for the election of a chairman of the commission; for the employment of necessary legal and clerical assistance; requires an annual report by the commission of its activities to the governor of each state, and the submission to such governor of a proposed budget of expenditures; requires the keeping of an accurate account of receipts and disbursements; prohibits the com-

mission from incurring any obligation of any kind prior to the making of an adequate appropriation to meet the same; and prohibits the pledging of the credit of any signatory state except by and with the authority of the Legislature thereof.

Article VI of the compact provides, among other things, that:

"All sewage from municipalities or other political subdivision, public or private institutions, or corporations, discharged or permitted to flow into these portions of the Ohio River and its tributary waters which form boundaries between, or are contiguous to, two or more signatory States, or which flow from one signatory State into another signatory State, shall be so treated, within a time reasonable for the construction of the necessary works, as to provide for substantially complete removal of settleable solids, and the removal of not less than forty-five per cent (45%) of the total suspended solids; provided that, in order to protect the public health or to preserve the waters for other legitimate purposes, including those specified in Article I, in specific instances such higher degree of treatment shall be used as may be determined to be necessary by the Commission after investigation, due notice and hearing.

[fol. 27] "All industrial wastes discharged or permitted to flow into the aforesaid waters shall be modified or treated, within a time reasonable for the construction of the necessary works, in order to protect the public health or to preserve the waters for other legitimate purposes, including those specified in Article I, to such degree as may be determined to be necessary by the Commission after investigation, due notice and hearing.

"All sewage or industrial wastes discharged or permitted to flow into tributaries of the aforesaid waters situated wholly within one State shall be treated to that extent, if any, which may be necessary to maintain such waters in a sanitary and satisfactory condition at least equal to the condition of the waters of the interstate stream immediately above the confluence.

"The Commission is hereby authorized to adopt, prescribe and promulgate rules, regulations and standards for administering and enforcing the provisions of this article."

Article IX of the compact provides:

"The Commission may from time to time, after investigation and after a hearing, issue an order or orders upon any municipality, corporation, person, or other entity discharging sewage or industrial waste into the Ohio River or any other river, stream or water, any part of which constitutes any part of the boundary line between any two or more of the signatory States, or into any stream any part of which flows from any portion of one signatory State through any portion of another signatory State. Any such order or orders may prescribe the date on or before which such discharge shall be wholly or partially discontinued, modified or treated or otherwise disposed of. The Commission shall give reasonable notice of the time and place of the hearing to the municipality, corporation or other entity against which such order is proposed. No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the Commissioners from such State.

[fol. 28] "It shall be the duty of the municipality, corporation, person or other entity to comply with any such order issued against it or him by the Commission, and any court of general jurisdiction or any United States district court in any of the signatory States shall have the jurisdiction, by mandamus, injunction, specific performance or other form of remedy, to enforce any such order against any municipality, corporation or other entity domiciled or located within such State or whose discharge of the waste takes place within or adjoining such State, or against any employee, department or subdivision of such municipality, corporation, person or other entity: provided, however,

such court may review the order and affirm, reverse or modify the same upon any of the grounds customarily applicable in proceedings for court review of administrative decisions. The Commission or, at its request, the Attorney General or other law enforcing official, shall have power to institute in such court any action for the enforcement of such order."

This proceeding was instituted by the relators by filing their petition herein on January 24, 1950. A rule to show cause why the writ prayed for should not issue was awarded thereon, returnable on February 14, 1950. On the return day of the rule, respondent, Edgar B. Sims, Auditor, filed his demurrer to the petition of the relators, assigning numerous grounds, the substance of which will be referred to and discussed in this opinion. Respondent also filed his answer which does not raise any question of fact. The proceeding was argued orally and by briefs, and was submitted on relators' petition and respondent's demurrer and answer thereto.

The sole question to be determined in this proceeding is the power of the Legislature of this State to enact Chapter 38, Acts of the Legislature, 1939. The appropriation under attack must necessarily depend upon the validity of the said Act from the standpoint of legislative power. We are not here concerned with any question of policy, for, admittedly, that question rests with the Legislature, and its determination is not the proper function of the judicial [fol. 29] department of the State government. If the Legislature did not have power to make the enactment, the appropriation in question must fall. If it possessed such power, then the policy involved in the appropriation, and the amount thereof, was, for all practical purposes, within the exclusive jurisdiction of the Legislature.

The validity of the Act is attacked on four grounds: (1) The title of the Act fails to properly define the purpose thereof; (2) the appropriation involved was not for a public purpose; (3) it violates Sections 3, 4 and 6 of Article X of the Constitution of this State; and (4) the Legislature was without power to delegate to persons and agencies, outside the State, and beyond the control of the Legislature, the police powers of the State. We shall consider these points of attack in the order stated.

Section 30 of Article VI of the Constitution of this State provides that:

“No act hereafter passed shall embrace more than one object, and that shall be expressed in the title.
• • •”

The title of the Act here in question reads as follows:

“An act approving, ratifying and enacting into law the ‘Ohio River Valley Water Sanitation Compact’ for the prevention, abatement and control of pollution of the rivers, streams and waters in the Ohio river drainage basin and making the state of West Virginia a party thereto; creating the ‘Ohio River Valley Water Sanitation Commission’; providing for the members of such commission from the state of West Virginia; and providing for the carrying out of said compact.”

The attack on said title is limited to the last phrase “and providing for the carrying out of said compact”. It is contended that the language employed is insufficient to furnish [fol. 30] an index of what the Act contains with respect to the carrying out of the compact authorized thereby.

That part of Section 30, Article VI of our Constitution, quoted above, should be interpreted in a practical way. The clear purpose of the constitutional provision was to avoid having the purpose of a legislative enactment concealed in any way by the failure to state that purpose in the title of the Act. Generally speaking, every Act of a Legislature calls for some provision for its enforcement, and we think the rule to be general that the details of the means employed to enforce the Act need not be stated with any particularity in the title thereto. It is sufficient if in the title it is stated that the Act contains provisions for carrying it into effect. In *Sypolt v. Shaffer*, 130 W. Va. 310, 43 S. E. (2d) 235, in the body of the opinion, we said:

“All titles can be elaborated and many improved. However, the test of their sufficiency is whether they will convey to persons interested in the actual subject matter enough information to provoke the reading of the act, and will also properly restrict the purpose of the act to a single topic.”

See also *City of Wheeling v. American Casualty Co.*, 131 W. Va. 584, 48 S. E. (2d) 404. In the case at bar, we are permitted to take judicial notice of the provisions of Chapter 38, Acts of the Legislature, 1939, which incorporates in full the compact thereby enacted into law. That compact clearly sets out the purpose thereof, and the methods by which it may be made effective; and the Act itself, by Section 3 thereof, grants to the Sanitation Commission all the powers mentioned in the compact, and by Section 5 provides for the appropriation of moneys as a contribution of the share of this State in the carrying out of the purposes of the compact. In our opinion, the title of the Act sufficiently [fol. 31] states the purpose thereof.

The second point of the attack is that relators' petition does not allege that the appropriation was made for a public purpose. Having the Act and the compact before us, we think it clearly appears that the purpose sought to be effected by the organization of the Sanitation Commission, and the appropriation of public funds to meet West Virginia's share of the expense thereof, was for a public purpose, being, among other things, the preservation of the purity of our streams, and the guarding against danger to the health of the citizens of the State, and well within the police power of the State. We have no difficulty in holding that the appropriation made, if otherwise valid, was for a public purpose.

The third point of attack involved, Sections 3, 4 and 6 of Article X of the Constitution of this State. Section 3 provides that:

"No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the Auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated or provided. A complete and detailed statement of the receipts and expenditures of the public monies shall be published annually."

Section 4 reads:

"No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrec-

tion, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

Section 6 provides:

"The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become [fol. 32] responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever."

Assuming the Act to be otherwise valid, we do not think that Sections 3 or 6 of Article X of our Constitution, quoted above, would make it invalid. Section 3 merely provides how money shall be drawn from the State Treasury, and requires an accounting. Treating the Act and the compact as one enactment, we think an accounting is provided for; and, necessarily, the appropriation cannot be withdrawn from the treasury except on warrant issued by the auditor. That procedure has been provided for in this instance. The purpose of Section 6 of Article X was to guard against the granting of the credit of the State in aid of any county, city, township, corporation or person, or the assumption of their debts or liabilities; and against the State becoming a joint owner or stockholder in any company or association. In our judgment, the proposed Act does not violate this section. The purposes of the section are well known, being to guard against the mistakes of the mother Commonwealth of Virginia in granting aid to counties, and particularly in granting aid to organizations for the purposes of so-called public improvements, and in becoming stockholders of such organizations. It was not, we think, intended to inhibit the use of the State's funds in carrying out public purposes such as, we think, the clearing of our streams from pollution. We do not think it inhibits the organization of public corporations for the purpose of carrying out governmental purposes. *Sims v. Fisher*, 125 W. Va. 512, 25 S. E. (2d) 116.

The provisions of Section 4 of Article X, aforesaid, raises a more serious question. In effect, it provides that no debt

shall be contracted by the State except to meet casual deficits and other specified situations. Ordinarily, the creation of a [fol. 33] State board or commission which requires an appropriation of public funds to carry out its purposes is not treated as the creation of a debt, although its generally contemplated continuation from year to year, and for an indefinite period, must necessarily involve future appropriations. Practically all agencies created by the Legislature require appropriations from time to time, and that was necessarily contemplated at the time they were created.

But the Act before us involves an entirely different situation. We are here dealing with a compact between sovereign states and the Federal Government, treated as a contract which the Supreme Court of the United States, in a suit between states has power to enforce. If the compact creating the Ohio River Valley Water Sanitation Commission be upheld, then it creates what is in legal effect a contract binding on all the parties thereto, the obligation of which continues so long as that contract exists. Many cases might be cited, upholding the power of the Supreme Court of the United States to enforce such a compact, among which are *Green v. Biddle*, 8 Wheaton 1, 5 L. Ed. 547; *Pennsylvania v. Wheeling Bridge Co.*, 13 Howard 518, 14 L. Ed. 249; *Olin v. Kitzmiller*, 259 U. S. 260, 66 L. Ed. 930; *Dartmouth College v. Woodward*, 4 Wheaton 518, 4 L. Ed. 629; *Richmonds, etc. Railroad Co. v. Louisa, etc. Railroad Co.*, 13 Howard 71, 14 L. Ed. 55; *Virginia v. West Virginia*, 246 U. S. 565, 62 L. Ed. 883.

Treating the compact enacted into law by Chapter 38, Acts of the Legislature, 1939, as valid and enforceable, the question arises whether by entering into the same the Legislature did not bind itself to make future appropriations for its enforcement, and thereby create an obligation or debt binding upon future Legislatures.

[fol. 34] In this connection, it may be well to discuss some general principles involving the power of the Legislature as one of the three branches of our State government. As everyone knows, when the Declaration of Independence was adopted each of the thirteen colonies became sovereign and independent states, possessing all of the powers necessary to the government of the people residing therein, and including what is known as police power of the State. That power still rests in the states, except to the extent that it

has been delegated to the Federal Government by the original Constitution of the United States, or the Amendments thereto. It is generally assumed that the states did not, by the delegation of powers to the Federal Government, limit themselves in respect to the police power they then possessed; but from a practical standpoint, it cannot be denied that in the delegation of powers to the Federal Government some of the police powers of the states were included as incidental to the powers delegated. There was, of course, no specific delegation of police power by the states to the Federal Government.

All this being true, the states, being vested with the police power, adopted Constitutions which operated as a restraint of power and not a grant of power. *Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 97 S. E. 362; *City of Richmond v. Virginia Railway & Power Co.*, 141 Va. 69, 126 S. E. 353; *Mumpower v. Housing Authority*, 176 Va. 426, 11 S. E. (2d) 732.

In this State, it is provided that by Section 1 of Article VI of our Constitution that:

“The legislative power shall be vested in a Senate and House of Delegates. * * *”

So that with us all legislative power is vested in the Legislature. But it is not an absolute or unlimited power, because under our theory of government, which recognizes [fol. 35] that all power rests in the people, there are certain rules which even a Legislature with its vast legislative power cannot transgress. To illustrate: A Legislature does not possess power to collect revenues or expend the same except for a public purpose; it cannot bind the action of future Legislatures; it cannot grant, delegate or barter in perpetuity the police power of the State. These restrictions are not constitutional. There is nothing in our State Constitution which inhibits such actions; but they are, nevertheless, as much a part of the restraints upon the Legislature as if they were specifically inhibited by the Constitution in express terms. This question was discussed by Judge Cooley in 1 Cooley's Constitutional Limitations (8th Ed.) 436, where it is stated:

“Equally incumbent upon the State legislature and these municipal bodies is the restriction that they shall adopt no irrepealable legislation. No legislative body

can so part with its powers by any proceeding as not to be able to continue the exercise of them. It can and should exercise them again and again, as often as the public interests require. Such a body has no power, even by contract, to control and embarrass its legislative powers and duties. * * *

In 11 Am. Jur. 983, it is stated:

"It is a fundamental principle of constitutional law that in matters relating to the police power each successive legislature is of equal authority. A legislative body cannot part with its right to exercise such power; it inherently has authority to use the power again and again, as often as the public interests may require. Hence, one session or body of the legislature may not by any contract with an individual restrain the power of a subsequent legislature to legislate for the public welfare. The governmental power of self-protection cannot be contracted away. Neither can the exercise of rights granted nor the use of property be withdrawn [fol. 36] from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.

"The foregoing principles are embodied in the familiar rule that the state cannot barter or bargain away the right to use the police power or by any contract divest itself of the power to provide for acknowledged objects of legislation falling within the domain of the police power. Accordingly, the legislature cannot surrender or limit such powers, either by affirmative action or by inaction, or abridge them by any grant, contract, or delegation whatsoever. In some states it is specifically provided in the state Constitutions that the exercise of the power may never be abridged."

In 16 Corpus Juris Secundum 549, it is stated:

"The police power of the state cannot be alienated, surrendered, or abridged in any manner whatsoever by the legislature or other agency exercising such power."

In *Laurel Fork & Sand Hill Railroad Co. v. West Va. Transportation Co.*, 25 W. Va. 324, this Court held:

"Irrevocable grants of franchises to corporations, which impair the supreme authority of the State to make laws for the right government of the State, must be regarded as mere licenses and not as contracts, which bind future legislatures; for no legislature can give away or sell the discretion of subsequent legislatures in respect to matters, the government of which from the very nature of things must vary in varying circumstances."

See also 4 Michie Jur. 169 and cases there cited.

As stated above, the thirteen colonies existing at the date of the Declaration of Independence became independent and sovereign states, and the states which have been since admitted into the Union, under the Constitution, are likewise independent and sovereign states, but all are subject to the powers delegated to the Federal Government [fol. 37] by the original Federal Constitution, and the Amendments thereto adopted from time to time. After the adoption of our Constitution, any one of the thirteen states could have entered into a compact with another without any interference on the part of the remainder of the other states. However, when our Federal Constitution was adopted, it was provided by Section 10 of Article I thereof that;

"No State shall, without the Consent of Congress
* * * enter into any Agreement or Compact with
another State, * * *"

This provision, of course, recognized the right of the State to enter into compacts with other states, with the consent of the Federal Government, which could only be effected by an Act of Congress. This recognition of the right to make such compacts between states furnishes the basis for the jurisdiction of the Federal courts should a controversy arise between two or more states, as provided by Section 2 of Article III of the Constitution of the United States, by which Section it is also provided that in controversies to which a state shall be a party, the Supreme Court of the United States shall have original jurisdiction. All this being

true, we are driven to the conclusion that if the challenged act and compact be upheld, the Legislature has, in all reasonable probability, bound future Legislatures to make appropriations for the continuation of the activities of the Sanitation Commission, and this, we think, amounts to the creation of a debt inhibited by Section 4 of Article X of our State Constitution.

The final, and, as we view it, the most important question raised on this record, relates to the power of the Legislature to delegate to the Ohio River Valley Water Sanitation Commission a part of the police power of the State. We think a reading of the compact creating such commission will disclose that this State has delegated and vested in such [fol. 38] commission, in perpetuity, a substantial part of its police power, so far as that power relates to the control of our streams, which power may be exercised by the said commission as a whole, and by which, with one exception to be hereafter noted, can if so desired be controlled and used by commissioners from other states in conjunction with commissioners appointed by the Federal Government.

One of the best definitions of the police power of the State is found in 11 Am. Jur. 966, where it is stated:

"The police power is an attribute of sovereignty and a necessary attribute of every civilized government. It is a general term used to express the particular right of a government which is inherent in every sovereignty. Consequently, it is inherent in the states of the American Union, possessed by every one of them as sovereign, and is not a grant derived from or under any written Constitution. In connection with this latter principle, the point of view has been expressed that the police power is a grant from the people to their governmental agents. It has also been affirmed, however, in discussing the source of the power, that the right of the legislature to exercise the police power is not only not referable to any single provision of the Constitution, but inheres in, and springs from, the nature of our institutions; and so the limitations upon it are those which spring from the same source, as well as those expressly set out in the Constitution. It is very generally regarded not as a delegated, but a reserved, power."

In 2 Cooley's Constitutional Limitations (8th Ed.) 1223, it is stated:

"The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment [fol. 39] of his own so far as is reasonably consistent with a like enjoyment of rights by others."

And it is defined by Blackstone as "the due regulation and domestic order of the Kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Bl. Com. 162.

As stated above, under our system of government, the police power has always been vested in the states, and was not, in terms, delegated by them to the Federal Government under the Constitution of the United States, although, undoubtedly, the Federal Government does exercise police power in the carrying out of powers delegated to it under the Federal Constitution. The police power, not owing its force to any constitutional provision, being of a nature necessarily to be exercised by all civilized governments, must stand above Constitutions and beyond the encroachments of legislative power. By common sense and necessity, the use of the police power of the State is vested in that branch of the government through which the people speak, namely, the Legislature; but it is a power, which, being within legislative control, cannot be permanently bartered away or alienated by any one Legislature. It is a power which must always remain in existence, and subject to legislative use when necessity arises. This being true, when a Legislature undertakes to delegate to any citizen, any municipality, or any other agency of the government inside the State, in perpetuity, or attempts to make a compact with another state or states, or with the Federal Government, by which it so delegates a part of its police power to be used within

this state or outside this state, it attempts to do something which it does not possess the power to do. While it possesses the power to delegate the police power to govern- [fol. 40] mental agencies within the State, it does not, in our opinion, possess the power to delegate any portion of that power to another state or to the Federal Government or to a combination of the two. We say this for two reasons: (1) The Legislature of the State of West Virginia has no extra-territorial power, and its attempted transfer of a part of the police power of the State vested in it is void and of no effect, as the power to delegate such police power is one which can only be exercised within this State; and (2) when exercising the police power within this State, it cannot be so delegated as to place it beyond the power of future Legislatures to withdraw such delegation at its will and pleasure. The authorities hereinbefore cited and discussed stress the point that the police power is something which must be always available for the use of the people, as represented by the Legislature. Any other interpretation of legislative power in respect thereto is unthinkable.

It is true that under the provisions of Article IX of the proposed compact it is provided that the order therein authorized to be made should not go into effect until it received the assent of at least a majority of the commissioners of at least a majority of the signatory states; and that no such order upon a municipality, corporation or person in any State should go into effect until it received the assent of not less than a majority of the commissioners from such state. This, in effect, provides that commissioners of any state may veto any proposed project within their state. This provision is not sufficient to take the act out of the inhibitions to which we have referred above. The authority to approve the project is delegated, and whether the same shall be vetoed depends upon the judgment of the commissioners who may be in office at the time the project is proposed and ordered.

[fol. 41] Here we have a most worthy enterprise, that of guarding against the pollution of our streams, and providing for the safety and health of our people by the restoration of our streams, to some extent, to their original purity, and adding to the joy of living by people who desire to take their recreation among the forests and streams of our State and neighboring states. We realize that in this

instance the purpose in view can only be worked out through cooperation between the states drained in whole or in part by the Ohio River and its tributaries. We would not be understood as desiring to stand in the way of such co-operation; but it must be such cooperation as does not surrender or barter away the rights of this State as one of the sovereign states of the Union. The police power must always be at the call of our Legislature to be used by it, or delegated to agencies of the government, to meet public emergencies as they arise. We cannot in safety surrender any part of that power to the Federal Government or to other states. To the extent that such power can be reserved to us within our borders, we can and probably should cooperate in the purposes which the Ohio River Valley Water Sanitation Commission was designed to promote. But the proposed legislation goes too far, and surrenders too much. The Legislature of this State did not possess the power to authorize the compact here involved and so far as this State is concerned the same is null and void. That being true, there was no basis for the appropriation, the payment of which is sought to be enforced in this proceeding. It follows that the writ must be denied.

Writ denied.

[fol. 42]

No. 10254

STATE ex Rel. DR. N. R. DYER, et al.

v.

EDGAR B. SIMS, Auditor

GIVEN, Judge, dissenting:

State compacts are in authority based on Clause 3 of Section 10 of Article I of the Federal Constitution, which reads: "No State shall, without the Consent of Congress, *** enter into any Agreement or Compact with another State, ***." Such compacts are now so embedded in our form of government as to constitute an essential part thereof. The compact under consideration affords a clear example of the necessity for such compacts. It proposes to operate in a field necessary for the health and general welfare of the people, wherein the Federal government has

not acted, and possibly cannot act at this time, and wherein it is impossible for the individual states to operate efficiently or successfully because of territorial limitations. Such compacts are not unusual. They have served well in fields of irrigation, conservation, boundary line disputes and many others. See Compact Clause of the Constitution, 34 Yale Law Journal 685; Interstate Compacts, 70 U. S. Law Review 557. For these reasons, and because of well-established applicable principles of law, which need no citation of authority, the legislation under consideration, which includes the compact, should be liberally construed to save its constitutionality.

The majority opinion, as I understand it, concedes the necessity for such a compact, and that the accomplishment of the purposes of such a compact may be best obtained by joint action of the several states concerned. It also concedes the constitutionality of the compact under consideration except in the two respects hereinafter considered. As early as 1929, those believing such a compact necessary for proper action, looking toward the purification of the [fol. 43] waters of the Ohio River and its tributaries, for protection of the health and for the general welfare of the people of the states concerned, were engaged in an effort to obtain the adoption of a workable compact. After years of study and effort by representatives of the several states concerned and of the Federal government, a compact was designed which was believed would be practicable and workable under the Constitutions of the several states. After further consideration and study, with possibly some minor changes, the compact in its present form was approved by the Congress of the United States in accordance with the provisions of Section 10, Article I of the Federal Constitution. Representatives of the several states concerned, by authority of their respective legislatures, have executed the compact, so that it is now in force and effect in so far as the powers of the states and the Federal government can make it so.

The Court now holds this compact unconstitutional for the reasons that the Legislature has exceeded its power in the delegation of police powers, and that the act of the Legislature adopting the compact, Chapter 38, Acts of the Legislature, Regular Session, 1939, attempts to bind future Legislatures of this State, in perpetuity, in the exercise

of its police powers, and as to making appropriations in aid of carrying out the purposes of the compact. Thus, this State is placed in the unenviable position of being unable to become a member of such a compact.

Does the compact in effect bind in any manner future Legislatures of this State, or does the compact grant any power or right in perpetuity? Article VII of the compact provides: "Nothing in this compact shall be construed to limit the powers of any signatory State, * * *." In the face of this clear reservation to "any signatory State" [fol. 44] of the "powers" of such state, I cannot believe that the intention to grant, in perpetuity, any power whether the police power or the power to make appropriations, can be read into the compact. The plain meaning of the language seems to be that the compact shall be so construed that no limit shall be placed upon any power of any signatory state as to any future action thereof. If this be correct, then there is no granting of any police power or any other power, in perpetuity, and no future Legislature is bound or attempted to be bound as to any such police power or as to the making of any future appropriation.

A further argument of the majority in support of the unconstitutionalitity of the compact is that the delegation of police power of the State cannot be made to some agency or commission set up in conjunction with other states. This doctrine would practically close the doors of this State to participation in any compact with any other state where the compact could not be made operative without aid of the police power. The compact here, however, restricts the use of the police power of the State to the authorized representatives of this State, the members of the commission appointed by this State, residents of this State, responsible only to the authority of this State and subject to removal as such commissioners by the Governor of this State. The only possible use of the police power granted to the commission would be in connection with the enforcement of orders of the commission as provided for in Article IX of the Compact. After proper investigation and hearing, the commission could issue orders requiring municipalities or persons to conform as to the disposition of sewage. In that article is found this limitation on the use or exercise of the power delegated: "No such order shall go into effect unless and until it receives the assent

[fol. 45] of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the Commissioners from such State." Thus, it will be seen that the compact itself vests in the commissioners representing this State, as such commissioners and not as individuals, the sole and absolute power to exercise and control the police power delegated. That power is not to be, and in the nature of things cannot be, exercised beyond the territorial limits of this State, and only courts within the jurisdiction of this State would have original jurisdiction in proceedings to enforce such orders. This being true, there could be no unlawful use or any unconstitutional delegation of any police power of this State. No language in the compact or the act can be construed to "grant" or perpetually "alienate" any police power. That intent is read into the legislation by the majority of the Court from the results which they believe will be brought about by the operation of the compact.

Does the act of which the compact is a part "create a debt" or bind future Legislatures to make appropriations? The majority opinion says yes; the compact says: "The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof." (Last clause, Article V.) In the face of this very emphatic command that the commissioners shall "not incur any obligation of any kind", the majority of this Court holds the act void "as creating a debt". But the authors of the compact, being zealous of [fol. 46] making the compact conform to the provisions of the Constitution, made further provision in the compact to the effect that "the credit" of any state should not be pledged "except with the authority of the legislature thereof." It is believed that any reading of this provision should force one to the conclusion that no debt can be incurred by the commission until the Legislature has made appropriation therefor, and that the commission cannot extend the credit of the State until authorized to do so by the Legislature existing at the time. There seems no doubt that these matters are fully reserved to future Legislatures,

and that future Legislatures are left free to legislate or not to legislate as to such police powers, and to appropriate or not to appropriate, as to them may seem proper.

The appropriation declared invalid was intended for use of the commission in the study and survey necessary for determination of the proper and most efficient methods of purifying the waters of the Ohio River and its tributaries. This was undoubtedly in the interest of this State since proper methods should be determined before the work of purification commenced and since the work could be done at less cost for each state by joint investigation and experimentation. Therefore, there can be no question that the appropriation was for a public purpose. The majority opinion concedes this much. In the expenditure of this appropriation, there would not be involved any of the police powers of this State, and such expenditure does not call for any further appropriation by the present or any future Legislature. Such further appropriations may become advisable, but that is a question that the future alone must determine. There is here involved no actual exercise of any police power or any effort to force any future appropriation. This being true, the questions of delegation of police power, the pledge of the credit of the State, and the binding of future Legislatures, are not involved in this mandamus [fol. 47] proceeding, and should not be decided until squarely before this Court. "A court will not pass upon the constitutionality of a statute, unless a decision upon that very point is necessary to the determination of the case." *Edgell v. Conaway*, 24 W. Va. 747, Point 1, Syllabus; *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. 635; *Dillon v. County Court*, 60 W. Va. 339, 55 S. E. 382; *Fry v. Ronceverte*, 93 W. Va. 388, 117 S. E. 140; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 54 L. ed. 826, 30 S. Ct. 534. "Indeed, it is well-settled that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question. The court will not permit these principles to be circumvented by the parties and hence will not recognize a waiver by them of consideration of all issues other than the constitutional one."

"In accordance with these rules, constitutional questions will not be determined abstractly or in a hypothetical case, or anticipated in advance of the necessity for determination

thereof, so that generally, no such consideration will be undertaken if no injury has as yet resulted from the application of the statute and no rights have been brought within its actual or threatened operation, * * *." 16 C. J. S., Constitutional Law, Section 94. To the same effect is 11 Am. Jur., Constitutional Law, Section 93.

Being of the views herein indicated, I respectfully dissent.

I am authorized to say that Judge Riley concurs in this dissent.

[fol. 48] ~~Clerk's Certificate to foregoing transcript omitted in printing.~~

{fol. 49] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 147

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER and W. W. JENNINGS, Commissioners for the State of West Virginia to The Ohio River Valley Water Sanitation Commission, D. Jackson Savage, Chairman of the State Water Commission of the State of West Virginia, and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming, and Dr. C. F. Mc Clintie, Members of the State Water Commission,

Petitioner,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND BRIEF IN SUPPORT THEREOF

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2. If the Power of a State of the Union to Enter Into Compacts with Other States of the Union Can Be Limited or Restricted by the Terms, Provisions or Conditions of Its Own Constitution, Does Article X, Section 4, of the Constitution of the State of West Virginia Restrict Such Power?
3. If Article X, Section 4, of the Constitution of the State of West Virginia Can and Does Restrict the Power of That State to Enter

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Supreme Court of the United States

OCTOBER TERM, 1950

No. _____

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER and W. W. JENNINGS, Commissioners for the State of West Virginia to The Ohio River Valley Water Sanitation Commission, D. Jackson Savage, Chairman of the State Water Commission of the State of West Virginia, and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming, and Dr. C. F. Mc Clintic, Members of the State Water Commission,

Petitioner,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner, the State of West Virginia, at the relation of Dr. N. H. Dyer and W. W. Jennings, Commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission, and the other parties designated in the caption, prays that a writ of certiorari be issued to the Supreme Court of Appeals of West Virginia to review the judgment of that Court entered in the above entitled cause.

JUDGMENT BELOW

The judgment of the court below was entered on April 4, 1950, (Record p. 13). The rules of the Supreme Court

of Appeals of West Virginia make no provision for a rehearing in a cause of this nature and, therefore, was not requested.

QUESTIONS PRESENTED

1. Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.
2. If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by the provisions of its own constitution, does Article X, Section 4, of the Constitution of the State of West Virginia restrict such power.
3. If Article X, Section 4 of the Constitution of the State of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the Ohio River Valley Water Sanitation Compact subject the State of West Virginia to any obligation in violation of the above mentioned Article and Section of its constitution?
4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the Legislature of the State of West Virginia resulted in an unconstitutional delegation of police power or of legislative authority.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The language of Article I, Section 10, Clause 3 of the Constitution of the United States which is pertinent to this cause is as follows:

“No state shall, without the consent of Congress . . . enter into any agreement or compact with another state. . . .”

2. The language of Article X, Section 4 of the Constitution of West Virginia is as follows:

"Limitation on Contracting of State Debt"

4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

3. Public Resolution No. 104, of the Seventy-Fourth Congress of the United States, approved June 8, 1936, authorized the states of the Ohio River drainage basin to enter into an interstate compact for the control and abatement of stream pollution in that basin. The full text of that resolution is set forth as Appendix A of this Petition and Brief.

4. Public No. 739-Seventy-Sixth Congress, Chapter 581-Third Session, S3617, approved July 11, 1940, expressly gave the consent and approval of Congress to the Ohio River Valley Water Sanitation Compact in the verbatim form in which it was ratified and enacted into law by all participating states. The full text of that Act, including the full text of the Compact, appears as Appendix B of this Petition and Brief.

5. Chapter 38 of the Acts of the West Virginia Legislature, Regular Session, 1939, ratified and enacted into law the Ohio River Valley Water Sanitation Compact. The full text of that Act, excluding the text of the Compact (which is identical with the text set out in Appendix B) appears as Appendix C of this Petition and Brief.

STATEMENT OF THE CASE

The judgment which Petitioner seeks to have reviewed by this Court was entered by the Supreme Court of Ap-

peals of West Virginia in a mandamus proceeding instituted in that court by Petitioner, upon the relation of the persons named above in the caption (Rec. pp. 1 & 5), seeking to compel Respondent, Edgar B. Sims, the duly elected and qualified Auditor of the State of West Virginia, to honor a requisition for the issuance of a warrant upon the treasury of the State for the payment of an appropriation previously made by the Legislature of West Virginia of the sum representing that State's proportionate share of the expenses, for the fiscal year 1949-1950 of the Ohio River Valley Water Sanitation Commission, an agency created by an interstate compact duly authorized and approved by Congress (Rec. pp. 3 & 4).

By Public Resolution No. 104, approved June 8, 1936, the Seventy-Fourth Congress of the United States authorized the states situated in the Ohio River drainage basin, including the State of West Virginia, to enter into an interstate compact for the control and abatement of stream pollution in that basin (Appendix A). Thereafter, commissioners from various states of the Ohio River basin were appointed by their respective Governors for the purpose of negotiating a compact in accordance with the foregoing authorization. Following agreement among the negotiating commissioners as to its form, the proposed compact was ratified by appropriate legislative action of the States of New York, Illinois, Kentucky, Indiana, Ohio and West Virginia (Appendix B). Thereafter, by Public No. 739-Seventy-Sixth Congress, Chapter 581-Third Session, S3617, approved July 11, 1940, the consent and approval of Congress was expressly given to the Ohio River Valley Water Sanitation Compact in the verbatim form agreed upon by the negotiating commissioners and ratified by the above mentioned six states (Rec. pp. 1 & 2 & Appendix B). Subsequently the Compact was ratified by

appropriate action of the legislatures and executives of the States of Pennsylvania and Virginia. In evidence of their ratification, adoption and enactment into law of the Ohio River Valley Water Sanitation Compact, that document was formally executed on behalf of each of the above named states, by their respective governors and other appropriate representatives at Cincinnati, Ohio, June 30, 1948 (Rec. p. 2).

Following the formal execution of the Compact, the Ohio River Valley Water Sanitation Commission, which was created by the terms and provisions of the Compact, was organized and launched upon a program designed to fulfill the objectives of the Compact.

Ratification and approval of the Ohio River Valley Water Sanitation Compact had been accomplished on March 11, 1939 (Rec. pp. 1 & 2), by the State of West Virginia through the enactment of Chapter 38, Acts of the West Virginia Legislature, Regular Session, 1939. It is this action of the Legislature of West Virginia which the Supreme Court of Appeals of that State has declared to be unconstitutional.

The Legislature of West Virginia duly appropriated from the general revenues of that State the sum of Twelve Thousand Two Hundred and Fifty Dollars (\$12,250.00), representing West Virginia's proportionate share, computed in accordance with the provisions of the Compact, of the expenses of the Ohio River Valley Water Sanitation Commission for its fiscal year, July 1, 1949 to June 30, 1950 (Rec. p. 2).

Respondent, Edgar B. Sims, as Auditor of the State of West Virginia, is required to issue warrants upon the Treasury of that State before appropriations of its legislature may be paid (Rec. p. 2). On August 26, 1949, Dr. N. H. Dyer, one of the relators in the proceeding below,

acting in his capacity as a duly appointed and qualified commissioner representing the State of West Virginia under the Ohio River Valley Water Sanitation Compact, submitted to Respondent as State Auditor, a requisition for the issuance of a warrant authorizing payment to the Ohio River Valley Water Sanitation Commission of the above mentioned sum appropriated by the Legislature of West Virginia (Rec. p. 3).

Respondent refused to honor the requisition submitted to him as above described and refused to honor such a requisition when, on two subsequent occasions, November 7, 1949 and December 22, 1949, it was resubmitted to him (Rec. p. 3). Proceedings were instituted by Petitioner in the Supreme Court of Appeals of West Virginia, the highest court of the State, seeking a writ of mandamus commanding respondent to issue the warrant requested as above described (Rec. pp. 1 & 5). Upon Petitioner's Application the Supreme Court of Appeals of West Virginia issued a rule commanding Respondent to appear and show cause why the relief sought by Petitioner against him should not be granted (Rec. p. 5). Upon the date set for the return of the rule, Respondent appeared and filed a demurrer (Rec. pp. 6 et seq.) to Petitioner's Application for a Writ of Mandamus and in addition filed an answer (Rec. pp. 7 et seq.) which raised no issues of fact but which set forth various grounds upon which respondent based his refusal to honor the requisition involved (Rec. pp. 7 et seq.).

Since no issues of fact had been raised, the cause was submitted to the Supreme Court of Appeals of West Virginia upon the pleadings and upon arguments and briefs of counsel (Rec. p. 12). Following consideration of the cause, the Court, by order entered April 4, 1950 (Rec. p. 13), and for reasons set forth in the opinion filed on behalf

of the majority of its members (Rec. pp. 14 et seq.), denied the requested writ of mandamus and dismissed Petitioner's application therefor. A dissenting opinion was filed on behalf of the minority members of the Court (Rec. pp. 32 et seq.).

RULING OF THE COURT BELOW

By its judgment sustaining the demurrer of Respondent and dismissing Petitioner's application for a writ of mandamus, the Supreme Judicial Court of West Virginia held that ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the Legislature of West Virginia was an unconstitutional legislative act for the reason that it violated Article X, Section 4 of the Constitution of West Virginia and for the further reason that it resulted in an unconstitutional delegation of police power. Since, in the opinion of the West Virginia Court, ratification and enactment into law of the Ohio River Valley Water Sanitation Compact was unconstitutional, that Court concluded that the appropriation by the Legislature of West Virginia of funds to cover that State's proportionate part of the expense of operating the Ohio River Valley Water Sanitation Commission was improper and, therefore, the Respondent, as Auditor of the State, was justified in refusing to honor the requisition which had been submitted to him for the issuance of a warrant authorizing payment from the State Treasury of the sum thus appropriated. To arrive at its decision the Supreme Court of Appeals of West Virginia necessarily had to hold that:

1. The State of West Virginia *could*, by the provisions of its constitution, restrict the power of that state to enter into compacts with other states notwithstanding the provisions of Article I, Section 10, Clause 3 of the Constitution of the United States;

2. Article X, Section 4 of the Constitution of West Virginia *does* limit and restrict the power of that State to enter into compacts with other states of the Union;
3. Article X of the Ohio River Valley Water Sanitation Compact *did* create an obligation on the part of the State of West Virginia in violation of Article X, Section 4 of its Constitution;
4. Ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the Legislature of West Virginia *did* result in an unconstitutional delegation of police power.

REASONS FOR THE ALLOWANCE OF THE WRIT

- 1. The Supreme Court of Appeals of West Virginia Has Decided Federal Questions of Substance Not Heretofore Determined by This Court.**

Each of the questions heretofore designated as being involved in this cause is a Federal question of substance which had to be answered by the Supreme Court of Appeals of West Virginia, in arriving at the ultimate decision evidenced by the judgment for which review is now sought. The first of the designated questions involves a conflict between certain language of the Constitution of West Virginia and the language of Article I, Section 10, Clause 3, of the Constitution of the United States, which, as more fully set forth in the brief, should be construed as not only a limitation upon the power of states to compact with one another, but also as a guarantee to them, within such limitation, of the irrevocable power to compact with each other on an equal footing.

If the contention of Petitioner with respect to the first question involved in this cause is correct, the second and third questions designated above do not need to be answered, but on the other hand, if that contention of Petitioner is not sustained by this Court, then questions two

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and three must be considered. While question two involves the interpretation of a provision of a state constitution, it also involves the validity of an interstate compact to which Congress has given consent and approval. As will be more fully pointed out in the brief, this Court has held that the validity of such interstate compacts is a Federal question to be decided by this Court notwithstanding the fact that application or interpretation of state constitutional provisions may be involved.

The third question designated above as being involved in this cause calls for an interpretation or construction of the Ohio River Valley Water Sanitation Compact itself. The interpretation or construction of an interstate compact, entered into with consent and approval of Congress presents a Federal question as to which this Court is the final arbiter.

The fourth question also involves an interpretation and construction of the Ohio River Valley Water Sanitation Compact in order to determine whether and to what extent any police power has been improperly delegated by the Legislature of West Virginia. Again, this is a Federal question which may be resolved with finality only by this Court.

All four of the questions which have been designated as being involved in this cause are Federal questions of substance. None of them has ever been answered by this Court insofar as counsel for Petitioner is able to determine. Although the first of these questions was not discussed in their respective opinions by either the majority or minority of the court below, all of them were directly involved in the decision which was there reached and all of them had to be answered, and answered in the manner above set forth, before the majority of the Supreme Court of Appeals of West Virginia could reach the conclusions upon which it based its judgment in this case.

2. The Questions Raised by This Cause Are of Great Public and General Interest.

While this cause stands before this Court as one primarily involving officials and other representatives of the State of West Virginia and as one limited in scope to the participation of the State of West Virginia in the Ohio River Valley Water Sanitation Commission, the significance of the decision of the court below extends far beyond the specific situation now before this Court. If the decision of the Supreme Court of Appeals of West Virginia is permitted to stand, not only will the State of West Virginia and its citizens be denied the benefits to be derived from seeking, through the joint efforts of the states of the Ohio River Valley, a common solution to an increasingly serious problem which is not limited by state boundaries and which can be solved only through regional action, but in addition West Virginia's participation in all other efforts to cooperate with sister states in solving common or mutual problems will be prevented or seriously curtailed.

It must also be recognized that the principles upon which the decision of the West Virginia Court is based may be accepted by the courts of any other state which is a signatory to the Ohio River Valley Water Sanitation Compact as authority for holding that participation of such other state in the Compact is unconstitutional. Thus the West Virginia decision places in jeopardy the entire effort on the part of the Ohio River Valley states to solve a vast regional problem through joint action.

Furthermore, the significance of the decision of the West Virginia Court in this cause is not limited to the Ohio River Valley Water Sanitation Compact or to West Virginia's participation in interstate activities. That decision, standing as a precedent for the proposition that local constitutional provisions may inferentially limit the power and authority of any state to enter into compacts with other

states and also standing as a precedent for the theory that the validity of an interstate compact is continuously subject to the varying interpretations which may be given to its provisions by the courts of participating states, casts doubt upon the validity of practically every interstate compact presently in existence. If permitted to stand, the West Virginia decision may at any time be brought forward and accepted as authority for holding unconstitutional any one of the current water pollution abatement compacts, any of the water allocation compacts which are familiar to the western part of the country, the New York Port Authority Compact, upon the basis of which millions of dollars of obligations have been issued, and the many other co-operative projects which have been undertaken by various groups of states. In addition, the principles of the West Virginia decision will no doubt deter other states from looking to the compact clause of the Constitution of the United States for a means of solving problems which project beyond state lines.

It has been stated above that the rules of practice before the Supreme Court of Appeals of West Virginia contain no provision for a rehearing of a case of this nature and as a result no reconsideration of its decision could be requested of the West Virginia Court. The proceedings had been instituted originally in the Supreme Court of Appeals of West Virginia and consequently that Court was not reviewing the conclusions of any other judicial body. Furthermore, the questions passed upon by the Court below were all questions of first impression with that Court and the members of the Court were divided three to two in their opinions upon the issues before them. These circumstances should weigh heavily in favor of having the judgment below reviewed by this Court since it can hardly be said at this point that the interests of the millions of inhabitants of the Ohio River Valley who will be affected by

the Compact under consideration have been accorded the judicial consideration to which they are entitled. It would be most unfortunate, to say the least, to have a project of the magnitude and importance of that contemplated by the Ohio River Valley Water Sanitation Compact scrapped or curtailed on the basis of a divided and unreviewed decision of a single court, in a case of first impression.

CONCLUSION

For the reasons above set forth it is respectfully submitted that this Petition should be granted.

JOHN B. HOLLISTER,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OPINIONS BELOW

Two opinions were filed in the Supreme Court of Appeals of West Virginia. The majority opinion was written by Judge Fox with two members of the Court concurring. That opinion was filed on April 4, 1950, and appears at page 14 of the Record. It is reported in 133 West Virginia Reports, page not yet determined, and in 58 Southeastern Reporter, 2nd Series, 766. The dissenting opinion was written by Judge Given, with one member of the court concurring. The minority opinion was filed on April 12, 1950, and appears at page 32 of the Record. It is reported in 133 West Virginia Reports, page not yet determined, and in 58 Southeastern Reporter, 2nd Series, beginning at page 777.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28, United States Code, Section 1257 (3). The judgment of

the Supreme Court of Appeals of West Virginia was entered April 4, 1950 (Rec. p. 13). A rehearing in a case of this nature is not provided for by the rules of that Court and, therefore, could not be requested. The Petition for Writ of Certiorari was filed June 28, 1950.

The Application for Mandamus filed in the Court below recited that Congress of the United States had given its consent and approval to the Ohio River Valley Water Sanitation Compact by Public-No. 739-Seventy-Sixth Congress (Rec. p. 2); that the Compact had been ratified and enacted into law by the Legislature of West Virginia (Rec. pp. 1 & 2), and that the appropriation of the Legislature of West Virginia with respect to which Respondent had declined to issue a warrant upon the State treasury had been made for the purpose of paying West Virginia's share of the expenses of the Ohio River Valley Water Sanitation Commission for the fiscal year July 1, 1949 to June 30, 1950 (Rec. p. 2). These facts were admitted by the pleadings of Respondent (Rec. pp. 6 & 7). The ruling of the Court below denying the requested order to compel payment of the appropriated sums was based upon the ground that the Compact under consideration was unconstitutional for the reasons (a) that it created a debt in violation of Article X, Section 4, of the Constitution of West Virginia, and (b) that it resulted in an improper delegation of police power. Thus the ruling below directly involved the validity and the construction of the Ohio River Valley Water Sanitation Compact, an interstate compact expressly approved by the Congress of the United States pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States.

In *Delaware River Joint Toll Bridge Commission v. Colburn* (1940), 310 U. S. 419, 84 L. Ed. 1287, this Court, expressly overruling an earlier decision, accepted jurisdiction to review, by writ of certiorari, a decision of the Court

of Errors and Appeals of the State of New Jersey construing the provisions of a compact between New Jersey and Pennsylvania for the construction of an interstate bridge over the Delaware River and applying such provisions, together with local New Jersey statutes, to the claim of a New Jersey property owner for consequential damages resulting from the erection of the bridge. This Court considered the case and reversed the State Court. Jurisdiction of this Court was expressly based upon the conclusion that *the construction of a compact sanctioned by virtue of Article I, Sec. 10, Clause 3, of the Constitution, involves a Federal title, right, privilege or immunity which, when specially set up and claimed in a state court, could be reviewed here on certiorari under Sec. 237 (b) of the Judicial Code, 26 USCA Sec. 344.*

The decision last discussed was based in part upon an earlier case, *Hinderlider v. LaPlata River & Cherry Creek Ditch Company* (1938), 204 U. S. 92, 82 L. Ed. 1202, in which this Court accepted jurisdiction by writ of certiorari under Sec. 237 (b) of the Judicial Code [now 28 U. S. C. 1257 (3)] to review a state court decision holding invalid, *on local constitutional grounds*, an interstate water apportionment compact to which Congress had assented.

As has heretofore been pointed out, the facts with respect to the Compact and its approval by Congress were set forth in Petitioner's pleadings in the Court below. This alone has been held to be sufficient to meet the requirements of 28 U. S. C. 1257 (3) to the effect that a Federal title, right, privilege or immunity be "specially set up or claimed."

Riley et al. v. New York Trust Company (1942), 315 U. S. 343, 86 L. Ed. 885.

Furthermore, the existence of a Federal question sufficient to sustain the jurisdiction of the Court is adequately

shown and the requirement that a Federal right, title, privilege or immunity be "specially set up or claimed," is sufficiently met when, as here, it appears from the opinion of the State court under review that a Federal question was assumed to be in issue, that it was considered by the court, and that a decision thereon was a necessary part of the ruling of the court.

San Jose Land and Water Company v. San Jose Ranch Company (1903), 189 U. S. 177, 180, 47 L. Ed. 765, 768;

Montana ex rel. Haire v. Rice (1907), 204 U. S. 291, 299, 51 L. Ed. 490, 494;

Charleston Federal Savings & Loan Association v. Alderson (1945), 324 U. S. 182, 185, 89 L. Ed. 857, 861.

When the highest court of a state has undertaken to pass upon Federal questions which are properly reviewable by this Court by certiorari, this Court will accept jurisdiction in an action in which, as in the instant case, a writ of mandamus is sought to compel a state official to disburse state funds or to perform other administrative acts.

State of Wyoming ex rel. Wyoming Agricultural College et al. v. Irvine (1907), 206 U. S. 278, 51 L. Ed. 1063;

Montana ex rel. Haire v. Rice (1907), 204 U. S. 291, 299, 51 L. Ed. 490, 494;

Coleman et al. v. Miller (1939), 307 U. S. 433, 83 L. Ed. 1385.

As a corollary to the foregoing discussion with respect to the jurisdiction of this Court, it should be pointed out that this Court may review and, if proper, reverse the judgment of the Supreme Court of Appeals of West Virginia in this case, notwithstanding the fact that State constitutional questions are involved in part, and this Court

is not bound by the decision of the Court below with respect to local constitutional questions insofar as they relate to the validity of the Compact which is the subject matter of this litigation or with respect to the meaning of the Compact.

Delaware River Joint Toll Bridge Commission v. Colburn (1940), 310 U. S. 419, 84 L. Ed. 1287; *Hinderlider v. LaPlata River & Cherry Creek Ditch Company* (1938), 204 U. S. 92, 82 L. Ed. 1202.

In *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784, it was expressly established that this Court is the "final constitutional arbiter" of questions relating to interstate compacts. In that case the Commonwealth of Kentucky sought specific performance by the State of Indiana of a compact, approved by Congress, to erect a bridge over the Ohio River. The defense of the State of Indiana was that it was not warranted in proceeding with the performance of the contract in the absence of the final determination of a separate proceeding, then pending in the state courts, wherein an Indiana citizen sought to enjoin performance of the contract on the ground that it was "unauthorized and void." By pointing out that the decision of the state court would not determine the controversy this Court indicated that the outcome of the state court litigation was immaterial. At pages 176 and 177 of the U. S. Report the following language was used:

"It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this Court is invoked, *this Court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged*. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either state, as well as of acts of Congress, which are said to authorize the con-

tract, in no way affects the duty of *this Court to act as final, constitutional arbiter* in deciding the questions properly presented.

* * * *

"where the states themselves are before this Court for the determination of a controversy between them, *neither can determine their rights inter sese*, and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved. *Virginia v. West Virginia*, 11 Wall 39, 56, 20 L. Ed. 67, 71, 220 U. S. 1, 28, 55 L. Ed. 353, 358, 31 Sup. Ct. Rep. 330. A decision in the present instance by the state court would not determine the controversy here." (Emphasis added.)

Although the case just discussed involved the states directly and was instituted in this Court as a matter of original jurisdiction, "the above quoted language with respect to the power of this Court to exercise independent judgment concerning questions involving interstate contracts should be equally applicable to the case at bar, where the validity of a compact between states is called in question."

The responsibility of this Court to exercise independent judgment with respect to state constitutional questions relating to state contracts is expressed in the following language in *Stearns v. Minnesota* (1900), 179 U. S. 223, 45 L. Ed. 162:

"The general rule of this Court is to accept the construction of a state constitution placed by the state supreme court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. *This court has always held that the competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract, were matters which, in discharging*

its duty under the Federal Constitution it must determine for itself; and while the leaning is toward the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract.” (Emphasis added.)

While the foregoing case involved a contract between a state and certain railroad companies, the statement quoted should apply equally to litigation, such as is now before this Court, involving a compact between states.

ARGUMENT

1. Whether the Power of a State of the Union to Enter into Compacts with other States of the Union to Which Consent and Approval of Congress Has Been Given Pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, Can Be Limited or Restricted by the Provisions of Its Own Constitution.

The judgment of the Supreme Court of Appeals of West Virginia treats the language of Article X, Section 4, of the Constitution of that State as a limitation upon the power of the State to enter into compacts with other states. While the question is not expressly discussed in either opinion filed in the Court below, the judgment here under consideration necessarily constitutes a holding by the Court that the local constitutional provision, by prohibiting the State from contracting any debt, prevents the State from entering into any interstate compact under which the State may be required to contribute financial support to the accomplishment of any of the objectives of such compact. Since practically every type of joint endeavor among states will require administration necessarily entailing some expense, the interpretation placed by the West Virginia Court upon the restrictions of Article X, Section 4, of the West Virginia Constitution would reduce to extremely narrow limits the area of interstate cooperation.

permissible to that State. It is the contention of Petitioner that such an interpretation of Article X, Section 4, places that provision of the West Virginia Constitution in conflict with the Compact Clause of the Federal Constitution. Article I, Section 10, Clause 3, of the Constitution of the United States does more than place a limitation upon the power of the states to enter into compacts with one another. It also operates as an affirmation of the inherent power of the sovereign States to enter into compacts with each other, free of possible cancellation, curtailment or limitation of any sort except for the single condition that the Congress of the United States must consent to its exercise. By that Clause of the Constitution, control over the power of the States to enter into compacts was withdrawn from state authority and preemptively vested in Congress.

The foregoing interpretation of the scope and effect of the compact clause is supported by the observations of Prof. (now Mr. Justice) Frankfurter and James M. Landis, appearing in *34 Yale Law Journal 685*, in an exhaustive treatise entitled "*The Compact Clause of the Constitution, A Study in Interstate Adjustments.*" At page 691 appears the following statement:

"...the Constitution authorizes a State to 'enter into any Agreement or Compact with another State' with 'the Consent of Congress'. Although, on very restricted occasions, availed of from the beginning, the pressure of modern interstate problems has revealed the rich potentialities of this device." (Emphasis added.)

As a footnote to the underlined portion of the above quotation the authors added:

"The Constitution puts this power negatively in order to express the limitation imposed upon its exercise. By putting this authority for State action in a section dealing with restrictions upon the States, the signifi-

cence of what was granted has probably been considerably minimized." (Emphasis added.)

While none of the foregoing observations have ever been specifically expressed in any reported cases, they are supported inferentially and in principle by a number of decisions of this Court. In *Hinderlider v. LaPlata River & Cherry Creek Ditch Company* (1938), 204 U. S. 92, 82 L. Ed. 1202, which has already been cited (pp. 13, 14 & 16) the validity of an interstate water allotment compact, approved by Congress, was sustained in the face of a contrary state court decision holding the compact to be in violation of provisions of the local constitution. This Court not only refused to be bound by the State Court's interpretation and application of provisions of its own constitution, but in addition this Court, by refusing to recognize the particular provisions of the State Constitution as invalidating the interstate compact which was before it, inferentially held that the inherent sovereign right of a state to compact with another could not be circumscribed by its own constitution.

As has already been discussed (Brief p. 16), this Court in *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784, refused to await the outcome of pending state court litigation involving the validity of a compact between the two states and proceeded to order specific performance of the compact in question. The condition of Congressional approval had been met. In the opinion it was expressly stated that a decision of the state court could not determine the controversy and in effect it was asserted that the compact was valid no matter what might be the outcome of the pending state court proceeding. While the nature of the attack in the state court upon the compact is not disclosed, except that it was unauthorized and void, that proceeding might have resulted in a finding of a local constitutional violation.

By its attitude of indifference in this respect, this Court gave clear indication that it did not consider compact powers of a state subject to limitation or restriction by state constitutional provisions.

The correctness of the proposition that by Article I, Section 10, Clause 3, Congress was vested with the sole authority to limit or restrict the powers of the states to compact with one another is supported by the early case of *Poole v. Fleegar*, (1837), 11 Peters, 185, 209, 9 L. Ed. 680, 690, in which the Court after pointing out that the right to settle boundary disputes by compact was a general right of sovereignty, stated:

"It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares that 'no State shall, without the consent of Congress, enter into any agreement or compact with another state'; thus plainly admitting that, with such consent, it might be done; and in the present instance, that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States." (Emphasis added.)

While the compact under consideration in the last cited case was a compact involving a boundary settlement, the above quoted language would have equal application to any other compact since the compact clause of the Constitution is not limited in application to boundary compacts but expressly relates to "any" compact.

In *Pennsylvania v. Wheeling & Belmont Bridge Company* (1851), 13 Howard 518, 14 L. Ed. 249, this Court in commenting upon a compact between Kentucky and Vir-

ginia with respect to the use and navigation of the Ohio River stated (p. 566) :

"This Compact, by the sanction of Congress, has become a law of the Union."

The most cogent language of this Court supporting the contention presently being made is to be found in the opinion written by Chief Justice White in *Virginia v. West Virginia* (1918), 246 U. S. 565, 62 L. Ed. 883. At page 601 and 602 of the U. S. Report the scope and effect of Article I, Section 10, Clause 3 of the Constitution of the United States was analyzed as follows (U. S. Report pp. 601, 602) :

"The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the Federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between states carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement. This must be the case unless it can be said that the duty of exacting the carrying out of a contract is not, within the principle of *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, relevant to the power to determine whether the contract should be made. But the one is so relevant to the other as to leave no room for dispute to the contrary.

"Having thus the power to provide for the execution of the contract, it must follow that the power is plenary

and complete; limited, of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This being true it further follows, as we have already seen, that by *the very fact that the national power is paramount in the area over which it extends*, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two states which it approved is not circumscribed by the powers reserved to the states. . . ." (Emphasis added.)

A recognition of the compact clause as a grant of authority for state action, as a withdrawal from state authority of jurisdiction to limit or restrict the power of states to compact with one another and as a vesting of that control in Congress, exclusively, would operate as an assurance to all States of the Union that with the consent of Congress, they may deal with one another through the use of interstate compacts without hesitation as to their respective powers to assume contemplated obligations and responsibilities. Without such assurance the States would at all times be faced with the possibility that a carefully negotiated compact might collapse by reason of a subsequently discovered lack of power on the part of one of the parties. Without such assurance no state could ever negotiate with another a compact for the adjustment of a dispute between them or for the solution of a common regional problem with any degree of confidence as to the validity of any understanding ultimately reached between them. Without such assurance, no state could risk proceeding with the performance of its responsibilities under a compact for fear that one or more of the other contracting states might subsequently be held to have exceeded its authority in entering the compact and thus be prevented from fulfilling its end of the bargain.

The compact can continue to be a practical and effective vehicle for interstate cooperation only if it is unequivocably established that all of the States of the Union are vested with equal powers to compact with one another regardless of the peculiarities of their respective constitutions or the views of their local courts. To that end Article X, Section 4 of the Constitution of the State of West Virginia, as construed and applied in this case by the Supreme Court of Appeals of that State, should be held to be an invasion of a field in which Congressional control is exclusive and, therefore, repugnant to Article I, Section 10, Clause 3, of the Constitution of the United States.

2. If the Power of a State of the Union to Enter into Compacts with other States of the Union Can Be Limited or Restricted by the Provisions of Its Own Constitution, Does Article X, Section 4, of the Constitution of the State of West Virginia Restrict Such Power?

If this Court should conclude that the power of a State to enter into compacts with other States can be limited or restricted by the provisions of its own constitution, it must then be decided whether Article X, Section 4, of the Constitution of the State of West Virginia *does* restrict such power. As a necessary part of the decision which this Court is asked to review, the Supreme Court of Appeals of West Virginia interpreted and applied the above mentioned provision of the Constitution of that State in a manner producing such a restrictive effect.

As has heretofore been pointed out, this Court is the "final constitutional arbiter" of questions involving the validity of compacts between states (Brief p. 17). In the discharge of its responsibility to determine whether the Ohio River Valley Water Sanitation Compact is valid and binding with respect to the State of West Virginia, this Court is not necessarily bound by the interpretation which

the Court below placed upon the local constitutional provision here involved and as the result of which that Court found the Compact to be invalid and unauthorized insofar as its state was concerned. This Court may properly review the decision of the Supreme Court of Appeals of West Virginia on the latter point and if the conclusion is reached that the State Court's interpretation of the language of Article X, Section 4, of the State Constitution was unwarranted, then the West Virginia Court may be reversed: If this Court cannot review the decision of the Court below in this respect, the State of West Virginia would be enabled to pass upon the validity of its own acts with respect to the Compact and upon its own rights under the Compact contrary to the pronouncement of this Court in *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784 (cited above, pp. 14, 17), to the effect that states cannot determine their rights "inter se" and that this Court "must pass upon every question essential to such a determination although local legislation and *questions of state authorization* may be involved."

The power of any state to enter into compacts or agreements with other states is an inherent power of sovereignty.

Poole v. Fleeger (1837), 11 Peters, 185, 209, 9 L. Ed. 680, 690 (cited above, p. 18);

Rhode Island v. Massachusetts (1830), 12 Peters, 657, 725, 9 L. Ed. 1233, 1261.

That power was considered by the drafters of the Constitution of the United States to be of such significance to the formation of "a more perfect Union" as to warrant the inclusion of a provision, which, as above pointed out, confirmed to the States the continuance of that power and at the same time placed in the Congress of the United States exclusive control over its exercise. It is a power which has

been characterized as a constitutional substitute for force as a means of adjusting interstate problems and disputes. Any curtailment by the States of their power to use such an instrumentality of statecraft should, if permitted at all, be scrutinized most carefully and limitations or restrictions thereon should not be created by implication but should be recognized only if imposed in clear and unequivocal language.

Notwithstanding the importance of the Compact as a vehicle for interstate adjustments and for interstate co-operation, by treating as a sure "debt" West Virginia's agreement under certain circumstances to bear a proportionate part of the expenses of administering the Ohio River Valley Water Sanitation Compact, the Supreme Court of Appeals of West Virginia has, by inference, read into the Constitution of that State a narrow and confining limitation upon the power of the State to deal with sister states or to participate in any cooperative interstate undertaking. An interpretation of Article X, Section 4, of the West Virginia Constitution as prohibiting entirely the assumption of any responsibility to contribute to the payment for or to share in the expenses of conducting any joint enterprise among states would substantially deprive West Virginia of the use of its power to compact with other states or to take any effective part in any cooperative interstate effort.

The restriction of Article X, Section 4, of the West Virginia Constitution, which merely says that "no debt shall be contracted" by that State, except under certain expressed circumstances, on its face, relates only to normal day to day fiscal matters and was not intended to circumscribe the compact powers of the State of West Virginia. This conclusion is borne out by the fact that the other Sections of Article X, all of which are in pari materia, involve only normal fiscal affairs of the state. The subject

matter of Article X, the full text of which is set forth as Appendix D of this Brief, is amply illustrated by the following listing of the subtitles which introduce its various Sections:

"ARTICLE X"

1. Taxation and Finance
2. Capitation Tax
3. Receipts and Expenditures of Public Monies
4. Limitation on Contracting of State Debt
5. Power of Taxation
6. Credit of State Not to Be Granted in Certain Cases
7. Duties of County Authorities in Assessing Taxes
8. Bonded Indebtedness of Counties, Etc.
9. Municipal Taxes to Be Uniform"

The intended scope of Article X, Section 4, of the West Virginia Constitution has been expressed by the Supreme Court of Appeals of that State in the following language in *Bates v. State Bridge Commission* (1930), 109 W. Va. 186, 153 S. E. 305:

"When our constitution of 1872 was formed, the experience of the mother state with debts contracted by her, and with suits to compel payment, were fresh in the minds of the framers of that Constitution. Numerous suits ending in heavy judgments and costs had been prosecuted against the Commonwealth; illiberal contracts and guarantees of enterprises had been made by government agencies detrimental to her interests; public officers and agencies had not been always zealous and careful in the conduct of public affairs; and juries leaned toward the individual as against the Commonwealth. With this experience the framers of the Constitution of 1872 provided that this State should not contract indebtedness, except in specified instances, and that the State should never be made defendant in "any court of law or equity. The debts against which the prohibition lies are those for which suit may be maintained or the state's revenues and resources pledged or sequestered."

Nothing in the language of Article X, Section 4, itself, justifies an extension of its application beyond the area defined by the above quoted language and into the realm of interstate relations. No ground for such an extension can be found in any of the other Sections of Article X which must be considered in connection with any construction of Section 4. Only by inference could the West Virginia Court use Article X, Section 4, as a basis for holding void the act of the West Virginia Legislature which ratified and enacted into law the Ohio River Valley Water Sanitation Compact. It is submitted that no such inference is warranted by the constitutional provisions under consideration and it is further submitted that West Virginia's power to participate in the cooperative effort represented by the Ohio River Valley Water Sanitation Compact should not be denied to it by inference.

3. If Article X, Section 4, of the Constitution of the State of West Virginia Can and Does Restrict the Power of That State to Enter into Compacts with other States of the Union, Then Does Article X, or Any Other Provision of the Ohio River Valley Water Sanitation Compact, Subject the State of West Virginia to Any Obligation in Violation of the Above Mentioned Article and Section of Its Constitution?

Should this Court, failing to accept the arguments of Petitioner with reference to the first two questions raised by this Petition, conclude that a state may by constitutional provision be restricted in its power to compact with other states and also conclude that Article X, Section 4, of the Constitution of West Virginia was properly interpreted as a limitation upon that State's power to compact, it would then become necessary for this Court to consider the third question raised by this petition. It is the contention of Petitioner that, if Article X, Section 4, of the West Virginia Constitution can and does limit the power of that State to enter into a compact, the provisions of

the Ohio River Valley Water Sanitation Compact should, if at all possible, be given a construction consistent with such limitation and favorable to its validity. It is the universal rule of statutory construction that the constitutionality of any legislative act will be sustained, if, by any reasonable interpretation it is possible to do so. Since it is never assumed that any legislative body intends to enact unconstitutional legislation, it will be held to have done so only in case of a plain infraction of the constitution from which there is no escape.

Kinney v. County Court (1931), 110 W. Va. 17, 156 S. E. 748;

Bates v. State Bridge Commission (1930), 109 W. Va. 186, 153 S. E. 305 (Brief p. 24).

The construction of the Ohio River Valley Water Sanitation Compact which was ratified and enacted into law by Chapter 38, Acts of the West Virginia Legislature, Regular Session, 1939, must be controlled by the same principles which govern the construction of any other legislative action. It must be presumed that the negotiators who initially drafted the Compact and the legislators who ultimately ratified it and enacted it into law in their respective states were intending to formulate an instrumentality of government which was fully within their powers to create and it must also be presumed that no one of them intended to exceed their own powers or expected any other negotiator or legislator to perform any unauthorized or invalid act. The Compact and each of its provisions must therefore be given that construction which is most favorable to its validity.

An examination of the language of the Compact itself will disclose that the only references made therein to finances or to financial obligations appear in Article V, second, third and fifth paragraphs and in Article X, which read as follows:

"ARTICLE V

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

"The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be duly constituted for that purpose.

"The Commission shall not incur any obligation of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof."

"ARTICLE X

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States, one-half of such amount to be prorated among the several states in proportion to their population within the District at the last preceding Federal census, the other half to be prorated in proportion to their land area within the District."

Nothing contained in the quoted portions of Article V may be construed as creating a debt or obligation on the part of any signatory state. On the contrary, those provisions reflect only a studied effort to keep the fiscal affairs of the Ohio River Valley Water Sanitation Compact sub-

ject to the supervision, discretion and control of the participating states.

Only in Article X is there to be found any language which may be interpreted as subjecting any signatory state to a financial obligation. Even that Section expressly provides for budgetary approval by the Governors of the signatory States, thus assuring to each state a full measure of control over the expenditures of the Commission. While Article X may include language capable of being construed as binding future legislatures to make appropriations, such an interpretation is neither mandatory nor inescapable. The language of Article X can, and, if necessary to sustain the constitutionality of the Compact, should be construed as merely being the expression of the understanding reached by the negotiators of the Compact with respect to the formula to be used in allocating among the signatory states the expenses of administering the Compact and of carrying on the operations of the Ohio River Valley Water Sanitation Commission.

It is submitted that if the language of Article X, Section 4, of the West Virginia Constitution can and does limit the general compact powers of that State, then the Compact under consideration can and must be construed in a manner consistent with its constitutionality, as was done by the minority members of the Supreme Court of Appeals of West Virginia.

4. Whether Ratification and Enactment into Law of the Ohio River Valley Water Sanitation Compact by the Legislature of the State of West Virginia Resulted in an Unconstitutional Delegation of Police Power.

Without reference to any express provision of the West Virginia Constitution, but relying entirely upon general legal principles, a majority of the members of the Court below held the Ohio River Valley Water Sanitation Com-

pact to be invalid, insofar as West Virginia was concerned, on the ground that the Compact results in an unauthorized delegation of the police power of that State. With that conclusion the minority of the Court again disagreed and in the separate dissenting opinion expressed the view that no delegation of police power was intended or was, in fact, accomplished by the provisions of the Compact.

Any finding of an improper delegation of police power would have to be based upon Articles VI and IX of the Compact. The second paragraph of Article VI provides a minimum standard for the treatment of sewage discharged into waters within the jurisdiction of the Ohio River Valley Water Sanitation Commission, and in addition provides that, in specific instances such higher degree of treatment shall be used as may be determined to be necessary by the Commission after investigation, notice and hearing.

The third paragraph of Article VI provides that all industrial wastes discharged into waters within the jurisdiction of the Commission shall be modified or treated, within a time reasonable for the construction of works, to such a degree as may be determined to be necessary by the Commission.

Paragraph five authorizes the Commission to adopt rules, regulations and standards for administering any of the provisions of the Article.

Article IX provides for the issuance of orders by the Commission to compel the abatement of any discharge of sewage or industrial wastes in violation of the Compact. No order may be effective against any corporation, person or entity within a state unless and until it receives the assent of not less than a majority of the Commissioners from such state. Article IX also authorizes the Commission to enforce compliance with its orders through actions insti-

tuted in state courts of general jurisdiction or in United States District Courts.

Thus it may be seen that what has been delegated to the Commission is the power:

- (a) to set standards in excess of the minimum set by the Compact for the treatment of sewage;
- (b) to set standards for the modification or treatment of industrial wastes;
- (c) to adopt rules and regulations for the administration of the Compact;
- (d) to issue and to enforce orders against violators of the Compact, but only if assent is obtained from a majority of the Commissioners from the state in which the violator is located.

The powers conferred upon the Commission by the Compact are merely administrative duties with respect to enforcement and establishment of standards which require expert professional study and attention. The conferring of such powers upon administrative agencies is an accepted legislative practice, particularly in the field of police regulations and matters relating to public health and welfare. No delegation of powers will be found in the Compact which violates the permissible limits of the delegation of legislative powers as discussed in *Panama Refining Company v. Ryan* (1934), 293 U. S. 388, 426 et seq., 79 L. Ed. 446, 462 et seq. and as reviewed in detail in the annotation which follows, at page 474, the Lawyers Edition Report of that case.

The propriety of clothing boards and commissions with judgment and discretion in carrying out legislative purposes has frequently been recognized by the Supreme Court of Appeals of West Virginia.

Bates v. State Bridge Commission (1930), 109 W. Va. 186, 153 S. E. 30 (Brief pp. 24 & 25);

State v. Bunner (1943), 126 W. Va. 280, 27 S. E. (2d) 823;

West Central Producers Cooperative v. Commissioner (1942), 124 W. Va. 81, 20 S. E. (2d) 797.

The Ohio River Valley Water Sanitation Commission is not an agency entirely independent of the states creating it and whose representatives are on it. The Commission as a whole is the agency of each participating state, even though its membership is drawn from all the states. No commission order whatsoever may go into effect without the consent of a majority of the commissioners of a majority of the signatory states, and no order upon a municipality, corporation or person in any state may go into effect without the consent of a majority of the commissioners of that particular state. Thus, regardless of the powers and duties which may have been conferred upon the Commission as a whole, the enforcement power with respect to any particular state has been retained in the hands of the appointees of that state. It is difficult to read from this situation any improper delegation of the police power of the state.

The conclusion of the majority of the Court below to the effect that the Legislature exceeded its authority in ratifying and enacting into law the Compact in question was in part based upon the thought that the Compact purported to bind the State in perpetuity. The Compact contains no express provisions as to the period for which it is to continue and it therefore must be assumed that it was the intention of each ratifying legislature, including the West Virginia Legislature, to obligate their respective States only to the extent and for the period of time that they had the power and authority to do so. If the Legislature of West Virginia had no authority to bind that State to the Ohio River Valley Water Sanitation Compact in perpetuity

then the ratifying action of that Legislature could not have done so and could not have been intended to do so. Certainly then the question as to the period during which the State of West Virginia may be obligated under the Compact should provide no sound basis for declaring its ratification to have been beyond the authority of the Legislature of that State.

Properly construed the Ohio River Valley Water Sanitation Compact makes no improper delegation of any police or legislative powers. At most the Compact confers upon a joint agency created by the participating states limited powers of enforcement and limited power to set standards, neither of which violates accepted principles. The agency upon which such powers are conferred i. e., the Ohio River Valley Water Sanitation Commission, is a common agency of all the States participating in the Compact. It is a governmental agency of the State of West Virginia on which that State jointly with the other States could properly confer the limited powers herein above discussed.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari in this cause should be granted.

Respectfully submitted,

JOHN B. HOLLISTER,
Attorney for Petitioner.

APPENDIX A

[**PUBLIC RESOLUTION—No. 104—74TH CONGRESS**
 [H. J. Res. 377].]

JOINT RESOLUTION

To enable the States of Maine, New Hampshire, New York, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, West Virginia, Kentucky, Indiana, Illinois, Tennessee, and Ohio to conserve and regulate the flow of and purify the waters of rivers and streams whose drainage basins lie within two or more of the said States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the States of Maine, New York, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, West Virginia, Kentucky, Indiana, Illinois, Tennessee, and Ohio, or any two or more of them, to negotiate and enter into agreements or compacts for conserving and regulating the flow, lessening flood damage, removing sources of pollution of the waters thereof, or making other public improvements on any rivers or streams whose drainage basins lie within any two or more of the said States.

Sec. 2. No such compact or agreement shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the legislatures of each of the States whose assent is contemplated by the terms of the compact or agreement and by the Congress.

Approved, June 8, 1936.

APPENDIX B

[PUBLIC—No. 739—76TH CONGRESS]

{CHAPTER 581—3D SESSION}

[S. 3617]

AN ACT

Granting the consent and approval of Congress to an interstate compact relating to control and reduction of pollution in the Ohio River drainage basin.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to an interstate compact relating to the control and reduction of the pollution of the streams of the Ohio River drainage basin negotiated and entered into or to be entered into under authority of Public Resolution Numbered 104, Seventy-fourth Congress, approved June 8, 1936, and now ratified by the States of New York, Illinois, Kentucky, and Indiana, and by the State of Ohio (whose ratification is to go into effect at the time at which the States of New York, Pennsylvania, and West Virginia enter into said compact as parties and signatory States), also by the State of West Virginia (whose ratification is to go into effect at the time at which the States of New York, Ohio, Virginia, and Pennsylvania enter into said compact as parties and signatory States), which compact reads as follows:

“SECTION 1.—**“OHIO RIVER VALLEY WATER SANITATION
COMPACT**

**“BETWEEN THE STATES OF ILLINOIS, INDIANA, KENTUCKY,
NEW YORK, OHIO, PENNSYLVANIA, TENNESSEE, AND WEST
VIRGINIA.**

“Pursuant to authority granted by an Act of the 74th Congress of the United States, Public Resolution 104, approved June 8, 1936, conferences of delegates appointed to draft the compact were held at Cincinnati, Ohio, on Nov. 20, 1936; Jan. 17, 1938; May 24, 1938; June 13, 1938; October 11, 1938.

"Whereas, a substantial part of the territory of each of the signatory states is situated within the drainage basin of the Ohio River; and

"Whereas, the rapid increase in the population of the various metropolitan areas situated within the Ohio drainage basin, and the growth in industrial activity within that area, have resulted in recent years in an increasingly serious pollution of the waters and streams within the said drainage basin, constituting a grave menace to the health, welfare, and recreational facilities of the people living in such basin, and occasioning great economic loss; and

"Whereas, the control of future pollution and the abatement of existing pollution in the waters of said basin are of prime importance to the people thereof, and can best be accomplished through the cooperation of the States situated therein, by and through a joint or common agency;

"Now, Therefore, The States of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee, and West Virginia do hereby covenant and agree as follows:

"ARTICLE I

"Each of the signatory States pledges to each of the other signatory States faithful cooperation in the control of future pollution in and abatement of existing pollution from the rivers, streams, and waters in the Ohio River basin which flow through, into or border upon any of such signatory States, and in order to effect such object, agrees to enact any necessary legislation to enable each such State to place and maintain the waters of said basin in a satisfactory sanitary condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances due to floating solids or sludge deposits, and adaptable to such other uses as may be legitimate.

"ARTICLE II

"The signatory States hereby create a district to be known as the 'Ohio River Valley Water Sanitation Dis-

trict,' hereinafter called the District, which shall embrace all territory within the signatory States, the water in which flows ultimately into the Ohio River, or its tributaries.

"ARTICLE III

"The signatory States hereby create the 'Ohio River Valley Water Sanitation Commission,' hereinafter called the Commission, which shall be a body corporate, with the powers and duties set forth herein, and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the signatory States or by act or acts of the Congress of the United States.

"ARTICLE IV

"The Commission shall consist of three commissioners from each State, each of whom shall be a citizen of the State from which he is appointed, and three commissioners representing the United States Government. The commissioners from each State shall be chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed, and any commissioner may be removed or suspended from office as provided by the law of the State from which he shall be appointed. The commissioners representing the United States shall be appointed by the President of the United States, or in such other manner as may be provided by Congress. The commissioners shall serve without compensation, but shall be paid their actual expenses incurred in and incident to the performance of their duties; but nothing herein shall prevent the appointment of an officer or employee of any State or of the United States Government.

"ARTICLE V

"The Commission shall elect from its number a chairman and vice-chairman, and shall appoint, and at its pleasure remove or discharge, such officers and legal, clerical, expert and other assistants as may be required to carry the provisions of this compact into effect, and shall fix and determine their duties, qualifications and compensation. It shall

adopt a seal and suitable by-laws, and shall adopt and promulgate rules and regulations for its management and control. It may establish and maintain one or more offices within the District for the transaction of its business, and may meet at any time or place. One or more commissioners from a majority of the member States shall constitute a quorum for the transaction of business.

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

"The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be duly constituted for that purpose.

"On or before the first day of December of each year, the Commission shall submit to the respective governors of the signatory States a full and complete report of its activities for the preceding year.

"The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof.

"ARTICLE VI"

"It is recognized by the signatory States that no single standard for the treatment of sewage or industrial wastes is applicable in all parts of the District due to such variable factors as size, flow, location, character, self-purification, and usage of waters within the District. The guiding principle of this compact shall be that pollution by sewage or industrial wastes originating within a signatory State shall not injuriously affect the various uses of the interstate waters as hereinbefore defined.

"All sewage from municipalities or other political subdivisions, public or private institutions, or corporations,

discharged or permitted to flow into these portions of the Ohio River and its tributary waters which form boundaries between, or are contiguous to, two or more signatory States, or which flow from one signatory State into another signatory State, shall be so treated, within a time reasonable for the construction of the necessary works, as to provide for substantially complete removal of settleable solids, and the removal of not less than forty-five per cent (45%) of the total suspended solids; provided that, in order to protect the public health or to preserve the waters for other legitimate purposes, including those specified in Article I, in specific instances such higher degree of treatment shall be used as may be determined to be necessary by the Commission after investigation, due notice and hearing.

"All industrial wastes discharged or permitted to flow into the aforesaid waters shall be modified or treated, within a time reasonable for the construction of the necessary works, in order to protect the public health or to preserve the waters for other legitimate purposes, including those specified in Article I, to such degree as may be determined to be necessary by the Commission after investigation, due notice and hearing.

"All sewage or industrial wastes discharged or permitted to flow into tributaries of the aforesaid waters situated wholly within one State shall be treated to that extent, if any, which may be necessary to maintain such waters in a sanitary and satisfactory condition at least equal to the condition of the waters of the interstate stream immediately above the confluence.

"The Commission is hereby authorized to adopt, prescribe and promulgate rules, regulations and standards for administering and enforcing the provisions of this article.

"ARTICLE VII

"Nothing in this compact shall be construed to limit the powers of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

"ARTICLE VIII

"The Commission shall conduct a survey of the territory included within the District, shall study the pollution problems of the District, and shall make a comprehensive report for the prevention or reduction of stream pollution therein. In preparing such report, the Commission shall confer with any national or regional planning body which may be established, and any department of the Federal Government authorized to deal with matters relating to the pollution problems of the District. The Commission shall draft and recommend to the governors of the various signatory States uniform legislation dealing with the pollution of rivers, streams and waters and other pollution problems within the District. The Commission shall consult with and advise the various States, communities, municipalities, corporations, persons, or other entities with regard to particular problems connected with the pollution of waters, particularly with regard to the construction of plants for the disposal of sewage, industrial and other waste. The Commission shall, more than one month prior to any regular meeting of the legislature of any State which is a party thereto, present to the governor of the State its recommendations relating to enactments to be made by any legislature in furthering the intents and purposes of this compact.

"ARTICLE IX

"The Commission may from time to time, after investigation and after a hearing, issue an order or orders upon any municipality, corporation, person, or other entity discharging sewage or industrial waste into the Ohio River or any other river, stream or water, any part of which constitutes any part of the boundary line between any two or more of the signatory States, or into any stream any part of which flows from any portion of one signatory State through any portion of another signatory State. Any such order or orders may prescribe the date on or before which such discharge shall be wholly or partially discontinued, modified or treated or otherwise disposed of. The Commission shall give reasonable notice of the time and place

of the hearing to the municipality, corporation or other entity against which such order is proposed. No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state.

"It shall be the duty of the municipality, corporation, person or other entity to comply with any such order issued against it or him by the Commission, and any court of general jurisdiction or any United States district court in any of the signatory States shall have the jurisdiction, by mandamus, injunction, specific performance or other form of remedy, to enforce any such order against any municipality, corporation or other entity domiciled or located within such State or whose discharge of the waste takes place within or adjoining such State, or against any employee, department or subdivision of such municipality, corporation, person or other entity; provided, however, such court may review the order and affirm, reverse or modify the same upon any of the grounds customarily applicable in proceedings for court review of administrative decisions. The Commission or, at its request, the Attorney General or other law enforcing official, shall have power to institute in such court any action for the enforcement of such order.

"ARTICLE X

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States, one-half of such amount to be prorated among the several States in proportion of their population within the District at the last preceding federal census, the other half to be prorated in proportion to their land area within the District.

"ARTICLE XI

"This compact shall become effective upon ratification by the legislatures of a majority of the States located within the District and upon approval by the Congress of the United States; and shall become effective as to any additional States signing thereafter at the time of such signing."

SEC. 2. Without further submission of said compact, the consent of Congress is hereby given to the State of Virginia or any other State with waters in the Ohio River drainage basin, entering into said compact as a signatory State and party in addition to the States therein named or any of them.

SEC. 3. The commissioners to represent the United States, as provided in article IV of said compact, shall be appointed by the President.

SEC. 4. Nothing contained in this Act or in the compact herein approved shall be construed as impairing or affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area or waters which are the subject of such compact.

SEC. 5. The right to alter, amend, or repeal the provisions of section 1 is hereby expressly reserved.

Approved, July 11, 1940.

APPENDIX C**CHAPTER 38**

(House Bill No. 369—By Mr. Brotherton)

AN ACT approving, ratifying and enacting into law the "Ohio River Valley Water Sanitation Compact" for the prevention, abatement and control of pollution of the rivers, streams and waters in the Ohio river drainage basin and making the state of West Virginia a party thereto; creating the "Ohio River Valley Water Sanitation Commission"; providing for the members of such commission from the state of West Virginia; and providing for the carrying out of said compact.

(Passed March 11, 1939; in effect ninety days from passage. Approved by the Governor.)

SECTION

1. Ohio river valley water sanitation compact approved.
2. Appointment of members of Ohio river valley water sanitation commission; state commissioner of health to be a member ex officio.
3. Powers of commission; duties of state officers, departments, etc.; jurisdiction of circuit courts; enforcement of act.
4. Powers granted herein supplemental to other powers vested in commission.
5. Expenses of commission; appropriations; officers and employees; meetings.
6. When act to become effective.

Be it enacted by the Legislature of West Virginia:

Section 1. Ohio River Valley Water Sanitation Compact Approved. The following Ohio River Valley Water Sanitation Compact, which has been negotiated by representatives of the states of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee and West Virginia, is hereby approved, ratified, adopted, enacted into law, and entered into by the state of West Virginia as a party thereto and signatory state, namely:

(At this point in the Act appears the verbatim text of the Ohio River Valley Water Sanitation Compact which has already been set forth as a part of Appendix B.)

Section 2. Appointment of Members of Ohio River Valley Water Sanitation Commission; State Commissioner of Health to be Ex Officio Member. In pursuance of article four of said compact, there shall be three members of the "Ohio River Valley Water Sanitation Commission" from the state of West Virginia. The governor, by and with the advice and consent of the Senate, shall appoint two persons as two of such commissioners, each of whom shall be a resident and citizen of this state. The terms of one of the said two commissioners first appointed shall be three years and of the other shall be six years; and their successors shall be appointed by the governor, by and with the advice and consent of the Senate for terms of six years each. Each commissioner shall hold office until his successor shall be appointed and qualified. Vacancies occurring in the office of any such commissioner from any reason or cause shall be filled by appointment by the governor, by and with the advice and consent of the Senate, for the unexpired term. The third commissioner from this state shall be the commissioner of health ex officio, and the term of any such ex officio commissioner shall terminate at the time he ceases to hold said office of commissioner of health, and his successor as a commissioner shall be his successor as said commissioner of health. With the exception of the issuance of any order under the provisions of article nine of the compact, said ex officio commissioner may delegate, from time to time, to any deputy or other subordinate in his department or office, the power to be present and participate, including voting, as his representative or substitute at any meeting of or hearing by or other proceeding of the commission. The terms of each of the initial three members shall begin at the date of the appointment of the two appointive commissioners, provided the said compact shall then have gone into effect in accordance with article eleven of the compact; otherwise shall begin upon the date which said compact shall become effective in accordance with said article eleven.

Any commissioner may be removed from office by the governor.

Section 3. Powers of Commission; Duties of State Officers, Departments, etc.; Jurisdiction of Circuit Courts; Enforcement of Act. There is hereby granted to the commission and commissioners thereof all the powers provided for in the said compact and all the powers necessary or incidental to the carrying out of said compact in every particular. All officers of this state are hereby authorized and directed to do all things falling within their respective provinces and jurisdiction necessary to or incidental to the carrying out of said compact in every particular; it being hereby declared to be the policy of this state to perform and carry out the said compact and to accomplish the purposes thereof. All officers, bureaus, departments and persons of and in the state government or administration of this state of West Virginia are hereby authorized and directed at convenient times and upon request of the said commission to furnish the said commission with information and data possessed by them or any of them and to aid said commission by loan of personnel or other means lying within their legal powers respectively.

The circuit courts of this state are hereby granted the jurisdiction specified in article nine of said compact, and the attorney general or any other law-enforcing officer of this state is hereby granted the power to institute any action for the enforcement of the orders of the commission as specified in said article nine of the compact.

Section 4. Powers Granted Herein Supplemental to Other Powers Vested in Commission. Any powers herein granted to the commission shall be regarded as in aid of and supplemental to and in no case a limitation upon any of the powers vested in said commission by other laws of this state or by the laws of the states of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee, or by congress or the terms of said compact.

Section 5. Expenses of Commission; Appropriations; Officers and Employees; Meetings. The commissioners shall be reimbursed out of moneys appropriated for such purposes, all sums which they necessarily shall expend in the discharge of their duties as members of such commission.

There shall be appropriated to the commission out of any moneys in the state treasury unexpended and available therefor, and not otherwise appropriated, such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportion of the state of West Virginia of the annual budget of the "Ohio River Valley Water Sanitation Commission" in accordance with article ten of said compact.

The commission shall elect from its membership a chairman and may also select a secretary who need not be a member. The commission may employ such assistance as it may deem necessarily required, and the duties of such assistants shall be prescribed and their compensation fixed by the commission and paid out of the state treasury out of funds appropriated for such purposes upon the requisition of said commission:

The commission shall meet at such times and places as agreed upon by the commissioners or upon call of its chairman.

Section 6. When Act to Become Effective. This act shall take effect and become operative and the compact be executed for and on behalf of this state only from and after the approval, ratification, and adoption, and entering into thereof by the states of New York, Pennsylvania, Ohio, and Virginia.

APPENDIX D**THE CONSTITUTION OF WEST VIRGINIA**
ARTICLE X*Taxation and Finance*

1. Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants, one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the Legislature shall further provide by general law for increasing the maximum rates authorized to be fixed by the different levying bodies upon all classes of property by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty percent of the qualified voters shall favor such increase, and such increase shall not continue for a longer period than three years at any one time, and shall never exceed by more than fifty percent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be apportioned by the Legislature among the levying units of the State in proportion to the levy laid in said units upon real and other personal property; but property used for educational, literary,

scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including live stock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. The Legislature shall have authority to tax privileges, franchises and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the Legislature may provide. After the year nineteen hundred thirty-three, the rate of the state tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the State now existing.

(This section, prior to its amendment, read as follows: "Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries and public property may, by law, be exempted from taxation. The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

The amendment as above set forth was proposed by House Joint Resolution No. 3, adopted August 6, 1932 (Acts Ex. Sess. 1932, p. 16) and was ratified at the general election in 1932. Vote on the amendment: For ratification, 335,482; against ratification, 43,931; majority 291,551.)

Capitation Tax

2. The Legislature shall levy an annual capitation tax of one dollar upon each male inhabitant of the State who

has attained the age of twenty-one years, which shall be annually appropriated to the support of free schools. Persons afflicted with bodily infirmity may be exempted from this tax.

Receipts and Expenditures of Public Monies

3. No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the Auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated or provided. A complete and detailed statement of the receipts and expenditures of the public monies shall be published annually.

Limitation on Contracting of State Debt

4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

Power of Taxation

5. The power of taxation of the Legislature shall extend to provisions for the payment of the State debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State, but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year.

Credit of State Not to Be Granted in Certain Cases

6. The credit of the State shall not be granted to, or in aid of any country, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever.

Duties of County Authorities in Assessing Taxes.

7. County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation except for the support of free schools; payment of indebtedness existing at the time of the adoption of this Constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three-fifths of all the votes cast for and against it.

Bonded Indebtedness of Counties, Etc.

8. No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years: Provided, That no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same.

Municipal Taxes to Be Uniform

9. The Legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 147

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER and W. W. JENNINGS, Commissioners
for the State of West Virginia to The Ohio
River Valley Water Sanitation Commission, D. Jackson
Savage, Chairman of the State Water Commission of
the State of West Virginia, and Dr. N. H. Dyer, W. W.
Jennings, Dan B. Fleming, and Dr. C. F. McClintic,
Members of the State Water Commission,

Petitioner,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia,

Respondent.

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 147

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER and W. W. JENNINGS, Commissioners for the State of West Virginia to The Ohio River Valley Water Sanitation Commission, D. Jackson Savage, Chairman of the State Water Commission of the State of West Virginia, and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming, and Dr. C. F. McClintic, Members of the State Water Commission,

Petitioner,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

Two opinions were filed in the Supreme Court of Appeals of West Virginia. The majority opinion was written by Judge Fox with two members of the Court concurring. That opinion was filed on April 4, 1950, and appears at page 14 of the Record. It is reported in 133 West Virginia Reports, page —, and in 58 Southeastern Reporter, 2nd Series, page 766. The dissenting opinion was written by Judge Given, with one member of the court concurring. The minority opinion was filed on April 12, 1950, and appears at page 32 of the Record. It is reported in 133 West Virginia Reports, page —, and in 58 Southeastern Reporter, 2nd Series, beginning at page 777.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered April 4, 1950. The Petition for a Writ of Certiorari was filed in this Court on June 26, 1950, and was granted October 9, 1950. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10; Clause 3, of the Constitution of the United States, can be restricted by the provisions of its own constitution.
2. If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by the provisions of its own constitution, does Article X, Section 4, of the Constitution of the State of West Virginia restrict such power.
3. If Article X, Section 4 of the Constitution of the State of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the Ohio River Valley Water Sanitation Compact subject the State of West Virginia to any obligation in violation of the above mentioned Article and Section of its constitution?
4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the Legislature of the State of West Virginia resulted in an unconstitutional delegation of police power or of legislative authority.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The language of Article I, Section 10, Clause 3 of the Constitution of the United States which is pertinent to this cause is as follows:

"No state shall, without the consent of Congress . . . enter into any agreement or compact with another state. . . ."

2. The language of Article X, Section 4 of the Constitution of West Virginia is as follows:

"Limitation on Contracting of State Debt"

4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

3. Public Resolution No. 104, of the Seventy-Fourth Congress of the United States, approved June 8, 1936, authorized the states of the Ohio River drainage basin to enter into an interstate compact for the control and abatement of stream pollution in that basin. The full text of that resolution is set forth as Appendix A of this Brief.

4. Public No. 739-Seventy-Sixth Congress, Chapter 581-Third Session, S3617, approved July 11, 1940, expressly gave the consent and approval of Congress to the Ohio River Valley Water Sanitation Compact in the verbatim form in which it was ratified and enacted into law by all participating states. The full text of that Act, including the full text of the Compact, appears as Appendix B of this Brief.

5. Chapter 38 of the Acts of the West Virginia Legislature, Regular Session, 1939, ratified and enacted into law

the Ohio River Valley Water Sanitation Compact. The full text of that Act, excluding the text of the Compact (which is identical with the text set out in Appendix B) appears as Appendix C of this Brief.

STATEMENT OF THE CASE

The judgment which is presently before this Court for review was entered by the Supreme Court of Appeals of West Virginia in a mandamus proceeding instituted in that Court by Petitioner, upon the relation of the persons named above in the caption (Rec. pp. 1 & 5). By that proceeding Petitioner sought to compel Respondent, Edgar B. Sims, the duly elected and qualified Auditor of the State of West Virginia, to honor a requisition for the issuance of a warrant upon the treasury of the State for the payment of an appropriation previously made by the Legislature of West Virginia of the sum representing that State's proportionate share of the expenses, for the fiscal year 1949-1950, of the Ohio River Valley Water Sanitation Commission, an agency created by an interstate compact duly authorized and approved by Congress' (Rec. pp. 3 & 4).

By Public Resolution No. 104, approved June 8, 1936, the Seventy-Fourth Congress of the United States authorized the states situated in the Ohio River drainage basin, including the State of West Virginia, to enter into an interstate compact for the control and abatement of stream pollution in that basin (Appendix A). Thereafter, commissioners from various states of the Ohio River basin were appointed by their respective Governors for the purpose of negotiating a compact in accordance with the foregoing authorization. Following agreement among the negotiating commissioners as to its form, the proposed compact was ratified by appropriate legislative action of the States of New York, Illinois, Kentucky, Indiana, Ohio and West Virginia (Appendix B). Thereafter, by Public

No. 739-Seventy-Sixth Congress, Chapter 581-Third Session, S3617, approved July 11, 1940, the consent and approval of Congress was expressly given to the Ohio River Valley Water Sanitation Compact in the verbatim form agreed upon by the negotiating commissioners and ratified by the above mentioned six states (Rec. pp. 1 & 2 & Appendix B). Subsequently the Compact was ratified by appropriate action of the legislatures and executives of the States of Pennsylvania and Virginia. In evidence of their ratification, adoption and enactment into law of the Ohio River Valley Water Sanitation Compact, that document was formally executed on behalf of each of the above named states, by their respective governors and other appropriate representatives at Cincinnati, Ohio, June 30, 1948 (Rec. p. 2).

Following the formal execution of the Compact, the Ohio River Valley Water Sanitation Commission, which was created by the terms and provisions of the Compact, was organized and launched upon a program designed to fulfill the objectives of the Compact.

Ratification and approval of the Ohio River Valley Water Sanitation Compact had been accomplished on March 11, 1939 (Rec. pp. 1 & 2), by the State of West Virginia through the enactment of Chapter 38, Acts of the West Virginia Legislature, Regular Session, 1939. It is this action of the Legislature of West Virginia which the Supreme Court of Appeals of that State has declared to be unconstitutional.

The Legislature of West Virginia duly appropriated from the general revenues of that State the sum of Twelve Thousand Two Hundred and Fifty Dollars (\$12,250.00), representing West Virginia's proportionate share, computed in accordance with the provisions of the Compact, of the expenses of the Ohio River Valley Water Sanitation Commission for its fiscal year, July 1, 1949 to June 30, 1950 (Rec. p. 2).

Respondent, Edgar B. Sims, as Auditor of the State of West Virginia, is required to issue warrants upon the Treasury of that State before appropriations of its legislature may be paid (Rec. p. 2). On August 26, 1949, Dr. N. H. Dyer, one of the relators in the proceeding below, acting in his capacity as a duly appointed and qualified commissioner representing the State of West Virginia under the Ohio River Valley Water Sanitation Compact, submitted to Respondent as State Auditor, a requisition for the issuance of a warrant authorizing payment to the Ohio River Valley Water Sanitation Commission of the above mentioned sum appropriated by the Legislature of West Virginia (Rec. p. 3).

Respondent refused to honor the requisition submitted to him as above described and refused to honor such a requisition when, on two subsequent occasions, November 7, 1949 and December 22, 1949, it was resubmitted to him (Rec. p. 3). Proceedings were instituted by Petitioner in the Supreme Court of Appeals of West Virginia, the highest court of the State, seeking a writ of mandamus commanding respondent to issue the warrant requested as above described (Rec. pp. 1 & 5). Upon Petitioner's Application the Supreme Court of Appeals of West Virginia issued a rule commanding Respondent to appear and show cause why the relief sought by Petitioner against him should not be granted (Rec. p. 5). Upon the date set for the return of the rule, Respondent appeared and filed a demurrer (Rec. pp. 6 et seq.) to Petitioner's Application for a Writ of Mandamus and in addition filed an answer (Rec. pp. 7 et seq.) which raised no issues of fact but which set forth various grounds upon which respondent based his refusal to honor the requisition involved (Rec. pp. 7 et seq.).

Since no issues of fact had been raised, the cause was submitted to the Supreme Court of Appeals of West Vir-

ginia upon the pleadings and upon arguments and briefs of counsel (Rec. p. 12). Following consideration of the cause, the Court, by order entered April 4, 1950 (Rec. p. 13), and for reasons set forth in the opinion filed on behalf of the majority of its members (Rec. pp. 14 et seq.), denied the requested writ of mandamus and dismissed Petitioner's application therefor. A dissenting opinion was filed on behalf of the minority members of the Court (Rec. pp. 32 et seq.).

A Petition for a Writ of Certiorari was filed in this Court on June 26, 1950 and was granted on October 8, 1950.

SUMMARY OF ARGUMENT

By the judgment presently under review the Supreme Judicial Court of West Virginia has held that ratification and enactment into law of the Ohio River Valley Water Sanitation Compact was an unconstitutional legislative act on the part of the Legislature of West Virginia for the reason that it violated Article X, Section 4, of the Constitution of that State. Such a decision was necessarily based upon the conclusion that the power of the State to enter into compacts with other states *could* be restricted by the provisions of its own constitution and that the above mentioned section of the West Virginia Constitution *did* restrict that State from entering into this Compact because the provisions of the Compact for the payment of the expenses of its administration constituted a debt of the type prohibited by that section of its constitution. In addition, the Court below viewed the Ohio River Valley Water Sanitation Compact as resulting, if otherwise valid, in an unconstitutional delegation of police power.

Carefully analyzed, the decision of the West Virginia Court presents the four basic problems which have been set forth above as the questions presented in this case. Petitioner's views with respect to those basic problems may be summarized as follows:

(1) The power of a state to enter into compacts with other states of the Union cannot be restricted or circumscribed by provisions of its own constitution for the reason that Article I, Section 10, Clause 3, of the Constitution of the United States proclaims that attribute of sovereignty to be subject only to the limitation that Congress consent to its exercise and thereby withdraws from the states and vests in Congress the power to control interstate agreements.

(2) Article X, Section 4, of the Constitution of West Virginia deals with matters of local fiscal policy and procedure and should not be interpreted as creating a limitation upon the exercise by that State of its inherent sovereign power to enter into compacts with other sovereignties.

(3) If the Legislature of West Virginia did not have the authority to obligate that State to contribute financial support to the joint enterprise contemplated by the Ohio River Valley Water Sanitation Compact, then the Compact can and should be construed as creating no obligation which would impair its validity.

(4) Any delegation of police power which may result from West Virginia's ratification of the Ohio River Valley Water Sanitation Compact is a valid exercise of legislative authority.

ARGUMENT

1. Whether the Power of a State of the Union to Enter into Compacts with other States of the Union to Which Consent and Approval of Congress Has Been Given Pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, Can Be Restricted by the Provisions of Its Own Constitution?

Before a federation of sovereign states such as that established by the Constitution of the United States can be expected to survive, there must be made available to

the member states, as a substitute for force, an effective and efficient means for settling disputes and for adjusting conflicts of interests. Without such machinery any union of states would soon disintegrate under the strain of interstate quarrels and controversies not susceptible to peaceful permanent solution. Having had rather intimate familiarity with early colonial boundary disputes and with the interstate conflicts which caused the Confederacy of the United States of America to fail, the framers of the Constitution of the United States certainly realized that this need had to be filled if the "more perfect Union" envisioned by them was to be achieved. Actually the Constitution makes provision for two methods of resolving possible conflicts between states. The first method is by litigation instituted in the Supreme Court of the United States, while the second method, which is much more flexible, adaptable and effective than the first, is by agreement through interstate compact approved by Congress.

For many years prior to this Country's independence compacts approved by the Crown had been used to bring about the peaceful settlement of inter-colonial disputes. The effectiveness of this method of adjusting such conflicts must have been well known to the drafters of the Constitution and it is therefore only natural that such a proven instrumentality of Government was incorporated in the new Constitution, with approval by Congress substituted for approval by the Crown.

Article I, Section 10, Clause 3 of the Constitution of the United States which provides that "no state shall, without the consent of Congress . . . enter into any agreement or compact with another state . . ." must be recognized as more than a limitation upon the power of the states to enter into compacts with one another. That language should also be treated as an affirmation of the inherent power of the sovereign states to enter into compacts with

each other, free of the possibility of curtailment or limitation of any sort except for the single condition that the Congress of the United States must consent to its exercise. By that clause of the Constitution, control of the power of the states to enter into compacts was withdrawn from state authority and preemptively vested in Congress.

The foregoing interpretation of the scope and effect of the compact clause is supported by the observations of Professor (now Mr. Justice) Frankfurter and James M. Landis, appearing in *34 Yale Law Journal* 685, in an exhaustive treatise entitled "*The Compact Clause of the Constitution, A Study in Interstate Adjustments.*" After describing the background and development of the compact clause the authors expressed the following observations at page 691:

"...the Constitution authorizes a State to enter into any Agreement or Compact with another State" with "the Consent of Congress". Although, on very restricted occasions, availed of from the beginning, the pressure of modern interstate problems has revealed the rich potentialities of this device." (Emphasis added.)

As a footnote to the underlined portion of the above quotation the authors added:

"The Constitution puts this power negatively in order to express the limitation imposed upon its exercise. By putting this authority for State action in a section dealing with restrictions upon the States, the significance of what was granted has probably been considerably minimized." (Emphasis added.)

While none of the foregoing observations have ever been specifically expressed in any reported cases, they are supported inferentially and in principle by a number of decisions of this Court. In *Hinderlider v. LaPlata River d*

Cherry Creek Ditch Company (1938), 304 U. S. 92, 82 L. Ed. 1202, the validity of an interstate water allotment compact, approved by Congress, was sustained in the face of a contrary state court decision holding the compact to be in violation of provisions of the local constitution. This Court not only refused to be bound by the State Court's interpretation and application of provisions of its own constitution, but in addition this Court, by refusing to recognize the particular provisions of the State Constitution as invalidating the interstate compact which was before it, inferentially held that the inherent sovereign right of a state to compact with another could not be circumscribed by its own constitution.

In *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784, this Court was called upon to pass upon the validity of a compact between the Commonwealth of Kentucky and the State of Indiana providing for the erection of a bridge over the Ohio River. In an action originating in this Court the Commonwealth of Kentucky sought specific performance of the compact by the State of Indiana. The defense of the State of Indiana was that it was not warranted in proceeding with the performance of the contract in the absence of a final determination of a separate action, then pending in the State Courts, wherein Indiana citizens sought to enjoin performance of the contract on the ground that it was "unauthorized and void." In holding that a decision of the State Court could not determine the controversy and, in effect, asserting that the compact in question was valid no matter what might be the outcome of the pending State Court proceeding, this Court did not discuss or even consider the possibility that state constitutional provisions might be violated. The compact had been entered into by the participating states with the consent of Congress and through procedures which the states themselves considered to be valid. From an examination of the

opinion itself, it does not appear that the Court was concerned with the possibility of there being any violation of a local constitutional provision. It is submitted that this attitude on the part of the Court gave clear indication that it did not consider the compact powers of a state to be subject to limitation or restriction by state constitutional provisions.

The proposition that Article I, Section 10, Clause 3, of the Constitution vested in Congress the sole authority to limit or restrict the powers of the states to compact with one another is supported by the early case of *Poole v. Fleeger* (1837), 11 Peters, 185, 209, 9 L. Ed. 680, 690, in which the Court, after pointing out that the right to settle boundary disputes by compact was a general right of sovereignty, stated:

"It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares that 'no State shall, without the consent of Congress, enter into any agreement or compact with another state'; thus plainly admitting that, with such consent, it might be done; and in the present instance, that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States." (Emphasis added.)

In *Pennsylvania v. Wheeling & Belmont Bridge Company* (1851), 13 Howard 518, 14 L. Ed. 249, this Court in commenting upon a compact between Kentucky and Virginia with respect to the use and navigation of the Ohio River stated (p. 566):

"This Compact, by the sanction of Congress, has become a law of the Union."

The most cogent language of this Court supporting the contention, presently being made is to be found in the opinion written by Chief Justice White in *Virginia v. West Virginia* (1918), 246 U. S. 565, 62 L. Ed. 883. At page 601 and 602 of the U. S. Report the scope and effect of Article I, Section 10, Clause 3 of the Constitution of the United States was analyzed as follows (U. S. Report pp. 601, 602):

"The resting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the Federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between states carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement. This must be the case unless it can be said that the duty of exacting the carrying out of a contract is not, within the principle of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, relevant to the power to determine whether the contract should be made. But the one is so relevant to the other as to leave no room for dispute to the contrary.

"Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete; limited, of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This, being true it further follows, as we have already seen, that by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel com-

pliance with the obligation resulting from the contract between the two states which it approved is not circumscribed by the powers reserved to the states. . . ." (Emphasis added.)

There is nothing new in the idea that the States' power of action in a sphere which is of particular significance to future interstate relationships should be placed beyond the influence of state restrictions upon its use. Similar protection against restriction by state action has been given to the power of a state to ratify an amendment to the Federal Constitution, a power somewhat similar to and as fundamental an attribute of state sovereignty as the compact power. In *Hawke v. Smith, Secretary of State of Ohio* (1920), 253 U. S. 221, 64 L. Ed. 871, this Court held that, since Article V of the Federal Constitution established the method to be used in amending the Federal Constitution, the action of the General Assembly of Ohio, ratifying the Eighteenth Amendment, could not be made subject to referendum in that State even though a provision of the Ohio Constitution expressly extended the right of referendum to legislative approval of Federal Constitutional Amendments. If the Constitution of the United States placed the power of ratification of amendments beyond the reach of limitations or restrictions which might be imposed by state constitutions then there certainly could be nothing startling in the proposition that Article I, Section 10, Clause 3, of the Constitution removed the Compact power of the states from the influence of local constitutional provisions.

There is, indeed, ample justification for protecting the compact power of the several states from the unlimited restrictions and limitations which might be imposed upon its exercise by the various state constitutions. Absence of such protection would make every compact between states subject to attack as being in violation of some provision of the constitution of one of the signatory states. A recog-

nition of the compact clause as a grant of authority for state action or as a withdrawal from state authority of jurisdiction to limit or restrict the power of the states to compact with one another would assure all states of the Union that, with the consent of the Congress, they can deal with one another through interstate compacts without hesitation as to their respective powers to assume contemplated obligations and responsibilities. With such assurance compacting states would not be faced with the possibility that a carefully negotiated compact might at any time collapse by reason of a subsequently discovered lack of power on the part of one of the parties and the states could, therefore, negotiate compacts for the adjustment of disputes between them or for the solution of common regional problems with confidence as to the validity of any understanding ultimately reached between them. Without such assurance no state could risk proceeding with the fulfillment of its responsibilities under a compact for fear that one or more of the other contracting states might subsequently be held to have exceeded its authority in entering the compact and thus be prevented from performing its end of the bargain.

The compact can continue to be a practical and effective vehicle for interstate cooperation only if it is unequivocally established that all of the states of the Union are vested with equal powers to compact with one another regardless of the peculiarities of their respective constitutions or the views of their local courts.

We submit that where the procedure established by the Federal Constitution for the creation of interstate compacts is followed, any inhibitory provisions of a state constitution must be disregarded.

2. If the Power of a State of the Union to Enter into Compacts with other States of the Union Can Be Restricted by the Provisions of Its Own Constitution, Does Article X, Section 4, of the Constitution of the State of West Virginia Restrict Such Power?

If this Court should conclude that the power of a State to enter into compacts with other States can be restricted by the provisions of its own constitution, it must then be decided whether Article X, Section 4, of the Constitution of the State of West Virginia does restrict such power. As a necessary part of the decision which this Court is asked to review, the Supreme Court of Appeals of West Virginia interpreted and applied the above mentioned provision of the Constitution of that State in a manner producing such a restrictive effect.

Article X, Section 4 of the West Virginia Constitution reads as follows:

"Limitation on Contracting of State Debt"

4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrections; repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

While not expressly stated in either opinion filed in the Court below, the judgment hereunder consideration necessarily constitutes a holding that by prohibiting the state from contracting any debt the above quoted constitutional provision prevents the state from entering into any interstate compact under which the state may be required to contribute financial support to the accomplishment of any of its objectives. Since practically every type of joint endeavor among states requires administration necessarily entailing some expense, the interpretation placed by the

West Virginia Court upon the restrictions of Article X, Section 4, of the West Virginia Constitution would reduce to extremely narrow limits the sphere of interstate cooperation permissible to that state.

This Court is not bound by the decision of the Court below with respect to local constitutional questions insofar as they relate to the validity of the Compact which is the subject matter of this litigation, or with respect to the meaning of the Compact and this Court may reverse the judgment of the Supreme Court of Appeals of West Virginia notwithstanding the fact that state constitutional questions are involved in part. Such jurisdiction of this Court is clearly indicated by the action taken in *Delaware River Joint Toll Bridge Commission v. Colburn* (1940), 310 U. S. 419, 84 L. Ed. 1287, and *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.* (1938), 304 U. S. 92, 110, Note 12, 82 L. Ed. 1202, 1212, 58 S. Ct. 803.

This Court is the "final constitutional arbiter" of questions involving the validity of compacts between states and if the conclusion is reached that the State Court's interpretation of the language of Article X, Section 4, of the State Constitution was unwarranted, then the West Virginia Court may be reversed. If this Court cannot reverse the decision of the Court below in this respect, the State of West Virginia would be enabled to pass upon the validity of its own acts with respect to the Compact and upon its own rights under the Compact contrary to the pronouncement of this Court in *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784, to the effect that states cannot determine their rights "inter se," and that this Court "must pass upon every question essential to such a determination although local legislation and *questions of state authorization* may be involved."

For the reasons hereinafter set forth, Petitioner contends that the Court below erroneously construed and

applied the provisions of Article X, Section 4 of the West Virginia Constitution and that the decision below may and should be reversed on that ground.

The power of any state to enter into compacts or agreements with other states is an inherent power of sovereignty.

Poole v. Fleeger, (1837), 11 Peters, 185, 209, 9 L. Ed. 680, 690;

Rhode Island v. Massachusetts, (1838), 12 Peters, 657, 725, 9 L. Ed. 1233, 1261.

That power was considered by the drafters of the Constitution of the United States to be of such significance to the formation of "a more perfect Union" as to warrant the inclusion of a provision, which, as above pointed out, confirmed to the States the continuance of that power and at the same time placed in the Congress of the United States exclusive control over its exercise. It is a power which has been characterized as a constitutional substitute for force as a means of adjusting interstate problems and disputes. Any curtailment by the States of their power to use such an instrumentality of statecraft should, if permitted at all, be scrutinized most carefully and limitations or restrictions thereon should not be created by implication but should be recognized only if imposed in clear and unequivocal language.

Notwithstanding the importance of the Compact as a vehicle for interstate adjustments and for interstate co-operation, by treating as a "debt" West Virginia's "agreement" under certain circumstances to bear a proportionate part of the expenses of administering the Ohio River Valley Water Sanitation Compact, the Supreme Court of Appeals of West Virginia has, by inference, read into the Constitution of that State a narrow and confining limitation upon the power of the State to deal with sister states or to participate in any cooperative interstate undertaking.

An interpretation of Article X, Section 4, of the West Virginia Constitution as prohibiting entirely the assumption of any responsibility to contribute to the payment for or to share in the expenses of conducting any joint enterprise among states would substantially deprive West Virginia of the use of its power to compact with other states or to take any effective part in any cooperative interstate effort.

The restriction of Article X, Section 4, of the West Virginia Constitution, which merely says that "no debt shall be contracted" by that State, except under certain expressed circumstances, on its face, relates only to normal fiscal matters and was not intended to circumscribe the compact powers of the State of West Virginia. This conclusion is borne out by the fact that the other Sections of Article X, all of which are in pari materia, involve only normal fiscal affairs of the state. The subject matter of Article X, the full text of which is set forth as Appendix D of this Brief, is amply illustrated by the following listing of the subtitles which introduce its various Sections:

"ARTICLE X"

1. Taxation and Finance
2. Capitation Tax
3. Receipts and Expenditures of Public Monies
4. Limitation on Contracting of State Debt
5. Power of Taxation
- ~~6.~~ Credit of State Not to Be Granted in Certain Cases
7. Duties of County Authorities in Assessing Taxes
8. Bonded Indebtedness of Counties, Etc.
9. Municipal Taxes to Be Uniform"

The intended scope of Article X, Section 4, of the West Virginia Constitution has been expressed by the Supreme Court of Appeals of that State in the following language in *Bates v. State Bridge Commission* (1930), 109 W. Va. 186, 153 S. E. 305:

"When our constitution of 1872 was formed, the experience of the mother state with debts contracted by

her, and with suits to compel payment, were fresh in the minds of the framers of that Constitution. Numerous suits ending in heavy judgments and costs had been prosecuted against the Commonwealth; illiberal contracts and guaranties of enterprises had been made by government agencies detrimental to her interests; public officers and agencies had not been always zealous and careful in the conduct of public affairs; and juries leaned toward the individual as against the Commonwealth. With this experience the framers of the Constitution of 1872 provided that this State should not contract indebtedness, except in specified instances; and that the State should never be made defendant in any court of law or equity. The debts against which the prohibition lies are those for which suit may be maintained or the states' revenues and resources pledged or sequestered."

Obviously the Court quoted above considered Article X, Section 4, as a prohibition against obligations which might arise in the normal course of the State's business and did not by any means consider it as a limitation upon its sovereignty. Nothing in the language of Article X, Section 4, itself, justifies an extension of its application beyond the area defined by the above quoted language and into the realm of interstate relations. No ground for such an extension can be found in any of the other Sections of Article X which must be considered in connection with any construction of Section 4. Only by inference could the West Virginia Court use Article X, Section 4, as a basis for holding void the act of the West Virginia Legislature which ratified and enacted into law the Ohio River Valley-Water Sanitation Compact. It is submitted that no such inference is warranted by the constitutional provisions under consideration and it is further submitted that West Virginia's power to participate in the cooperative effort represented by the Ohio River Valley Water Sanitation Compact should not be denied to it by inference.

Furthermore, a careful examination of Article X of the West Virginia Constitution will disclose that Section 4 was not intended to prohibit all financial commitments by the State but was only designed to limit the creation of funded indebtedness. Section 4 of Article X prohibits the contraction of a "debt" except in specified cases, and then goes on to say that the payment of any "liability" other than for "ordinary expenses" shall be equally distributed over a period of at least twenty years. This indicates that the words "debt" and "liability" are used synonymously. What is there being discussed is clearly a funded debt as evidenced by the insistence that it should be a long-term obligation. This is in contra-distinction to the "ordinary expenses" which obviously the state must meet regularly.

This interpretation of the terminology of Section 4 would seem to be borne out by the provisions of Section 5 which reads as follows:

"Power of Taxation"

5. The power of taxation of the Legislature shall extend to provisions for the payment of the State debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State, but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year."

Here again, the distinction is made between the "state debt," with interest, in other words a funded obligation, and the "annual estimated expenses" of the state; i. e., the "ordinary expenses" referred to in Section 4, which are the current costs of operating state agencies, and among which logically falls West Virginia's proportion of the cost of operating the Ohio River Valley Water Sanitation Commission.

Sections 7 and 8 make this distinction even clearer. Section 7 reads as follows:

"Duties of County Authorities in Assessing Taxes"

7. County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation except for the support of free schools; payment of indebtedness existing at the time of the adoption of this Constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three-fifths of all the votes cast for and against it."

Note that here the quotation "payment of indebtedness" is in reference to a funded debt carrying interest.

Section 8 reads as follows:

"Bonded Indebtedness of Counties, Etc."

8. No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years: Provided, That no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same."

Here, once more, the words "indebted," "indebtedness" and "debt" are all used with reference to funded obligations continuing over a period of years and carrying interest.

The foregoing comments with regard to the interpretation to be given to Article X, Section 4 of the West Virginia Constitution are supported by the language of the Supreme Court of Appeals of West Virginia in *Dickinson v. Talbott* (1933), 114 W. Va., 170 S. E. 425. That case involved the validity of bonds which the State proposed to issue for the purpose of funding various unpaid obligations which had arisen as the result of the State's inability to pay operating expenses from revenues received. Throughout the opinion sustaining the validity of the bond issue, the Court differentiated between a "debt" inhibited by the constitutional provision and obligations relating to the payment of current operating expenses and did so in a fashion which clearly indicates that the Court did not consider the prohibition of Article X, Section 4, to be applicable to current operating expenses but only considered it to be directed against long term funded obligations of the type represented by the bond issue before it.

Present consideration of the proper interpretation to be given to Article X, Section 4 might well be governed by the following language from the last cited case:

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"The state's constitutional requirements are for the preservation of the state and the maintenance of its integrity and for the protection of the people. Constitutional limitations must not be so construed as to be subversive of their very purpose. . . ."

Page 7

"Apropos of both sections 4 and 5, Article X, West Virginia Constitution, it is not to be considered that the framers of our Constitution or the people of the

state in ratifying and approving the same, meant to place barriers in the path of the state officials and the legislators, so circumscribing the fiscal affairs of the state as to create impossibility of escape from embarrassing situations."

An examination of the constitutions of most of the states of the United States and of a number of the other states who are parties to the Compact in question shows similar limitations on the incurring of debts, but in all cases the debts referred to are substantial obligations of a fixed nature to be retired over a period of years, and bearing interest. A current charge for operating an agency, following regular annual or biennial budget approval by the Governor and appropriation by the legislature, falls into an entirely different category, i. e., that of meeting current expenses of a state, and we submit that the inhibitions of the West Virginia Constitution against the incurring of debt would not, therefore, affect in any way any of the provisions of the Compact.

3. If Article X, Section 4, of the Constitution of the State of West Virginia Can and Does Restrict the Power of That State to Enter into Compacts with other States of the Union, Then Does Article X, or Any Other Provision of the Ohio River Valley Water Sanitation Compact, Subject the State of West Virginia to Any Obligation in Violation of the Above Mentioned Article and Section of Its Constitution?

Should this Court conclude that a state may by constitutional provision be restricted in its power to compact with other states and also conclude that Article X, Section 4, of the Constitution of West Virginia was properly interpreted as a limitation upon that State's power to compact, it would then become necessary for this Court to consider the third question involved in this cause. It is the contention of Petitioner that, if Article X, Section 4, of the

West Virginia Constitution can and does limit the power of that State to enter into a compact, the provisions of the Ohio River Valley Water Sanitation Compact should, if at all possible, be given a construction consistent with such limitation, and favorable to its validity. It is the universal rule of statutory construction that the constitutionality of any legislative act will be sustained, if, by any reasonable interpretation it is possible to do so. Since it is never assumed that any legislative body intends to enact unconstitutional legislation, it will be held to have done so only in case of a plain infraction of the constitution from which there is no escape.

Kinney v. County Court (1931), 110 W. Va. 17, 156 S. E. 748;

Bates v. State Bridge Commission (1930), 109 W. Va. 186, 153 S. E. 305.

The construction of the Ohio River Valley Water Sanitation Compact which was ratified and enacted into law by Chapter 38, Acts of the West Virginia Legislature, Regular Session, 1939, must be controlled by the same principles which govern the construction of any other legislative action. It must be presumed that the negotiators who initially drafted the Compact and the legislators who ultimately ratified it and enacted it into law in their respective states were intending to formulate an instrumentality of government which was fully within their powers to create and it must also be presumed that no one of them intended to exceed their own powers or expected any other negotiator or legislator to perform any unauthorized or invalid act. The Compact and each of its provisions must therefore be given that construction which is most favorable to its validity.

An examination of the language of the Compact itself will disclose that the only references made therein to fi-

nances or to financial obligations appear in Article V, second, third and fifth paragraphs and in Article X, which read as follows:

"ARTICLE V.

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

"The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be only constituted for that purpose.

"The Commission shall not incur any obligation of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof."

"ARTICLE X

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States, one-half of such amount to be prorated among the several states in proportion to their population within the District at the last preceding Federal census, the other half to be prorated in proportion to their land area within the District."

Nothing contained in the quoted portions of Article V may be construed as creating a debt or obligation on the part of any signatory state. On the contrary, those provisions reflect only a studied effort to keep the fiscal affairs of the Ohio River Valley Water Sanitation Compact sub-

ject to the supervision, discretion and control of the participating states.

Only in Article X is there to be found any language which may be interpreted as subjecting any signatory state to a financial obligation. Even that Section expressly provides for budgetary approval by the Governors of the signatory States, thus assuring to each state a full measure of control over the expenditures of the Commission. While Article X may include language capable of being construed as binding future legislatures to make appropriations, such an interpretation is neither mandatory nor inescapable. The language of Article X can, and, if necessary to sustain the constitutionality of the Compact, should be construed as merely being a declaration on the part of each signatory state of the intention to seek and to exert every effort to obtain from its legislature the periodic appropriation of its proportion, computed in accordance with the formula set forth in that Article, of the expenses of administering the Compact and conducting the operations of the Ohio River Valley Water Sanitation Commission.

It is submitted that if the language of Article X, Section 4, of the West Virginia Constitution can and does limit the general compact powers of that State, then the Compact under consideration can and must be construed in a manner consistent with its constitutionality, as was done by the minority members of the Supreme Court of Appeals of West Virginia.

It would appear that the Court below misconceived the nature of the obligation covered by the requisition which Respondent disapproved. Here was no case of a demand on the State of West Virginia to make a payment under a contract, the performance of which it was resisting. On the contrary, the head of the executive branch of the state had approved the budget of the Commission *without which* ~~any~~ *no request for funds could be made to the leg-*

lature. In turn, the legislative branch of the state had passed the necessary appropriation resolution *without which appropriation no payment could be made.* How did this differ from the regular appropriations of the State of West Virginia to defray the usual and ordinary expenses of its other agencies?

A reading of the Compact shows the studied effort that was made to avoid any semblance of committing the signatory states to financial obligations. Under Article V, the budget of the Commission must be submitted to the Governor of each separate state for presentation to that state's legislature, and Article V goes on to say that the Commission cannot incur any obligation until the appropriation is made. Furthermore, under Article X, a condition precedent to the agreement by a state to appropriate its share of the expenses is the approval by its Governor of this budget. If the time should ever arise when a Governor refuses to approve the budget, or after approval, a legislature refuses to make the appropriation, an interesting question of enforcement might arise, but under the existing conditions it is hard to understand the tortuous construction of the West Virginia Constitution which would make this conditional obligation a prohibited debt. Such a construction would seem to be a flagrant violation of the accepted rule of constitutional law that a legislative enactment will be upheld unless clearly in violation of the pertinent constitution.

4. Whether Ratification and Enactment into Law of the Ohio River Valley Water Sanitation Compact by the Legislature of the State of West Virginia Resulted in an Unconstitutional Delegation of Police Power.

Without reference to any express provision of the West Virginia Constitution, but relying entirely upon general legal principles, a majority of the members of the Com-

below held the Ohio River Valley Water Sanitation Compact to be invalid, insofar as West Virginia was concerned, on the ground that the Compact results in an unauthorized delegation of the police power of that State. With that conclusion the minority of the Court again disagreed and in the separate dissenting opinion expressed the view that no delegation of police power was intended or was, in fact, accomplished by the provisions of the Compact.

Any finding of an improper delegation of police power would have to be based upon Articles VI and IX of the Compact. The second paragraph of Article VI provides a minimum standard for the treatment of sewage discharged into waters within the jurisdiction of the Ohio River Valley Water Sanitation Commission, and in addition provides that in specific instances such higher degree of treatment shall be used as may be determined to be necessary by the Commission after investigation, notice and hearing:

The third paragraph of Article VI provides that all industrial wastes discharged into waters within the jurisdiction of the Commission shall be modified or treated, within a time reasonable for the construction of works, to such a degree as may be determined to be necessary by the Commission.

Paragraph five authorizes the Commission to adopt rules, regulations and standards for administering any of the provisions of the Article.

Article IX provides for the issuance of orders by the Commission to compel the abatement of any discharge of sewage or industrial wastes in violation of the Compact. No order may be effective against any corporation, person or entity within a state *unless and until it receives the assent of not less than a majority of the Commissioners from such state*. Article IX also authorizes the Commission to enforce compliance with its orders through actions in the

tuted in state courts of general jurisdiction or in United States District Courts.

Thus it may be seen that what has been delegated to the Commission is the power:

- (a) to set standards in excess of the minimum set by the Compact for the treatment of sewage;
- (b) to set standards for the modification or treatment of industrial wastes;
- (c) to adopt rules and regulations for the administration of the Compact;
- (d) to issue and to enforce orders against violators of the Compact, but only if assent is obtained from a majority of the Commissioners from the state in which the violator is located.

The powers conferred upon the Commission by the Compact are merely administrative duties with respect to the establishment and enforcement of the standards of sewage and waste treatment necessary to the accomplishment of the objective of the Compact, namely, the control and abatement of pollution in the Ohio River basin. Varying conditions throughout the basin made it impossible for the states participating in the Ohio River Valley Water Sanitation Compact to attempt to set forth therein any workable set of standards for the entire basin. The establishment and enforcement of such standards would necessarily require the continuing study and attention of professional sanitary engineers. For these obvious reasons it was necessary that the participating states confer upon the Commission charged with the responsibility of administering the Compact the duty of determining after proper research and deliberation the details of the sewage and waste treatment standards which would have to be established if the objectives of the Compact were to be realized.

It is now quite generally recognized that a legislative body may properly delegate to selected instrumentalities

the duty of establishing subordinate rules and regulations within prescribed limits. This practice is fully discussed in *Panama Refining Company v. Ryan* (1934), 293 U. S. 388, 426 et seq., 79 L. Ed. 446, 462 et seq. In *Butfield v. Stranahan* (1903), 192 U. S. 470, 496, 48 L. Ed. 525, 535, this Court approved an Act of Congress of March 2, 1897, entitled "An Act to Prevent the Importation of Impure and Unwholesome Tea" (29 Stat at L. 604 Chapt. 358). In that Act the Secretary of the Treasury was authorized and directed to "fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States." This Court held that the foregoing language fixed a primary standard and conferred upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The Court stated that:

"Congress legislated on the subject so far as was reasonably practical, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously asserted."

It is submitted that no delegation of powers will be found in the Ohio River Valley Water Sanitation Compact which violates the permissible limits set forth in the above cited cases or in the many other cases wherein this Court has sustained the delegation of rule making powers to various governmental agencies. An adequate primary standard for any treatment requirements or regulations to be established by the Commission will be found in Article I, of the Compact and in the first paragraph of Article VI which respectively read as follows:

"ARTICLE I"

"Each of the signatory States pledges to each of the other signatory States faithful cooperation in the control of future pollution in and abatement of existing pollution from the rivers, streams, and waters in the Ohio River basin which flow through, into or border upon any of such signatory States, and in order to effect such object, agrees to enact any necessary legislation to enable each such State to place and maintain the waters of said basin in a satisfactory sanitary condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances due to floating solids or sludge deposits and adaptable to such other uses as may be legitimate."

"ARTICLE VI"

"It is recognized by the signatory States that no single standard for the treatment of sewage or industrial wastes is applicable in all parts of the District due to such variable factors as size, flow, location, character, self-purification, and usage of waters within the District. The guiding principle of this compact shall be that pollution by sewage or industrial wastes originating within a signatory State shall not injuriously affect the various uses of the interstate waters as hereinbefore defined."

The propriety of clothing boards and commissions with judgment and discretion in carrying out legislative purposes has frequently been recognized by the Supreme Court of Appeals of West Virginia.

Bates v. State Bridge Commission (1930), 109 W. Va. 186, 153 S. E. 30;

State v. Burner (1943), 126 W. Va. 280, 27 S. E. (2d) 823;

West Central Producers Cooperative v. Commission (1942), 124 W. Va. 81, 20 S. E. (2d) 797.

In *State v. Bunner* (1943), 126 W. Va. 280, 27 S. E. (2d) 823, cited above, the West Virginia Court sustained the validity of legislation which vested the State Department of Health with authority to establish and enforce regulations to control the sale of milk. The Court discussed the general limitations upon the right of the legislature to delegate to a board or commission the power to make regulations and pointed out the need for legislatively established standards to guide the administrative body in the formulation of its regulations. Although the particular legislative act under consideration did not contain any standards for the regulations which the State Health Council was authorized to promulgate, the delegation of this authority was sustained by the West Virginia Court on the ground that it related to matters of public health and that the establishment of standards was therefore not necessary. On this point the Court made the following observations which are equally applicable to any delegation of power attempted by the Ohio River Valley Water Sanitation Compact which also deals with matters of public health (page 282):

"This general rule (power of legislative body to delegate rule making authority) however, is in some degree flexible, requiring less definite standards in cases where the establishment thereof is not practicable owing to the character of the business involved . . . but of more importance than the present case is another uniformly recognized exception to the general rule by which the legislature is much less restricted when its delegation of legislative authority is to an administrative body created for the care of public health. Ordinarily the power to delegate legislative authority must be found in the Constitution, but, where the subject matter of the administrative authority is public health, the power is uniformly held not to originate in the Constitution, but from 'the police power'. This vast undefinable reservoir of power inheres in the legislative body of

every sovereign state wholly independent of the Constitution. . . . Courts generally, therefore, take the position that regulations and rules duly promulgated by a legally constituted board of health will be construed as valid wherever possible if reasonably calculated to achieve the result intended by the Legislature."

The Court below did not actually hold that the Legislature of West Virginia was not empowered to delegate authority to establish and enforce regulations such as are contemplated by the Ohio River Valley Water Sanitation Compact, nor did the Court hold that any such attempted delegation was improper because of the absence of standards. Actually the Court (Record Page 31) stated that the Legislature of West Virginia possesses the power to delegate police power to governmental agencies within the State. The objection of the West Virginia Court to the alleged delegation of police power which it found in the Ohio River Valley Water Sanitation Compact was based upon the opinion that the Legislature of the State did not possess the power to delegate any portion of the police power to another state or to the Federal Government or to a combination of the two.

Certainly there is nothing fundamentally wrong with delegating such powers to outside agencies. If there were, then the Federal Government would be entirely without police power since it has only those powers which through the Constitution of the United States were delegated to it by the several individual states. Under the rationale of the opinion below any attempt by the States to vest police power in the Federal Government would have been beyond the power of those States.

By Compact between the States of New York and New Jersey the boundary line between the two states was to be the middle of the Hudson River, New York Bay and the

water between Staten Island and New Jersey. In addition the Compact provided that New York was to have "exclusive jurisdiction" over all the water of the bay of New York and the waters of the Hudson River west of Manhattan Island and over the land covered by said waters to the low water mark on the New Jersey side. This delegation by one state to another of police powers over area remaining subject to the sovereignty of the former was sustained by this Court in *Central Railroad Company of New Jersey v. Jersey City* (1908), 209 U. S. 473, 52 L. Ed. 896.

In *Wedding v. Meyler* (1904), 192 U. S. 573, 48 L. Ed. 570, this Court recognized and applied a provision contained in a Compact between Virginia and Kentucky by which states to be formed on the north side of the Ohio River were to have concurrent jurisdiction with Kentucky over the Ohio River flowing between them. This Court sustained the validity of service of summons in an Indiana law suit although the service was accomplished on a steamboat on the Ohio River, found by the jury to have been on the Kentucky side of the low water mark and therefore within the boundaries of Kentucky.

An exchange of jurisdiction over areas within their respective states was provided by an early Compact between Virginia and Maryland. This concurrent delegation of police power by each state to the other has been approved by this Court in *Wharton v. Wise* (1894), 153 U. S. 155, 38 L. Ed. 669.

The Ohio River Valley Water Sanitation Commission is not an agency entirely independent of the states creating it and whose representatives are on it. The Commission as a whole is the agency of each participating state, even though its membership is drawn from all the states. No commission order whatsoever may go into effect without the consent of a majority of the commissioners of a major-

ity of the signatory states, and no order upon a municipality, corporation or person in any state may go into effect without the consent of a majority of the commissioners of that particular state. Thus, regardless of the powers and duties which may have been conferred upon the Commission as a whole, the enforcement power with respect to any particular state has been retained in the hands of the appointees of that state. It is difficult to read from this situation any improper delegation of the police power of the state.

Properly construed the Ohio River Valley Water Sanitation Compact makes no improper delegation of any police or legislative powers. At most the Compact confers upon a joint agency created by the participating states limited powers of enforcement and limited power to set standards, neither of which violates accepted principles. The agency upon which such powers are conferred i. e., the Ohio River Valley Water Sanitation Commission, is a common agency of all the States participating in the Compact. It is a governmental agency of the State of West Virginia on which that State jointly with the other States could properly confer the limited powers herein above discussed.

CONCLUSION

For the reasons set forth above it is urged that the judgment of the Supreme Court of Appeals of West Virginia here under review be reversed.

Respectfully submitted,

JONX B. HOLLISTER,

Attorney for Petitioner.

APPENDIX A

[Public Resolution—No. 104—74th Congress]

(H. J. Res. 377)

JOINT RESOLUTION

To enable the States of Maine, New Hampshire, New York, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, West Virginia, Kentucky, Indiana, Illinois, Tennessee, and Ohio to conserve and regulate the flow of and purify the waters of rivers and streams whose drainage basins lie within two or more of the said States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the States of Maine, New York, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, West Virginia, Kentucky, Indiana, Illinois, Tennessee, and Ohio, or any two or more of them, to negotiate and enter into agreements or compacts for conserving and regulating the flow, lessening flood damage, removing sources of pollution of the waters thereof, or making other public improvements on any rivers or streams whose drainage basins lie within any two or more of the said States.

See, 2. No such compact or agreement shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the legislatures of each of the States whose assent is contemplated by the terms of the compact or agreement and by the Congress.

Approved, June 8, 1936.

APPENDIX B

[Public No. 739 - 76th Congress]

[CHAPTER 581 - 3d SESSION]

[S. 3617]

AN ACT

Granting the consent and approval of Congress to an interstate compact relating to control and reduction of pollution in the Ohio River drainage basin.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to an interstate compact relating to the control and reduction of the pollution of the streams of the Ohio River drainage basin negotiated and entered into or to be entered into under authority of Public Resolution Numbered 104, Seventy-fourth Congress, approved June 8, 1936, and now ratified by the States of New York, Illinois, Kentucky, and Indiana, and by the State of Ohio (whose ratification is to go into effect at the time at which the States of New York, Pennsylvania, and West Virginia enter into said compact as parties and signatory States); also by the State of West Virginia (whose ratification is to go into effect at the time at which the States of New York, Ohio, Virginia, and Pennsylvania enter into said compact as parties and signatory States), which compact reads as follows:

"SECTION I.**"OHIO RIVER VALLEY WATER SANITATION
COMPACT"**

**"BETWEEN THE STATES OF ILLINOIS, INDIANA, KENTUCKY,
NEW YORK, OHIO, PENNSYLVANIA, TENNESSEE, AND WEST
VIRGINIA.**

"Pursuant to authority granted by an Act of the 74th Congress of the United States, Public Resolution 104, approved June 8, 1936, conferences of delegates appointed to draft the compact were held at Cincinnati, Ohio, on Nov. 20, 1936; Jan. 17, 1938; May 24, 1938; June 13, 1938; October 11, 1938;

"Whereas, a substantial part of the territory of each of the signatory states is situated within the drainage basin of the Ohio River; and

"Whereas, the rapid increase in the population of the various metropolitan areas situated within the Ohio drainage basin, and the growth in industrial activity within that area, have resulted in recent years in an increasingly serious pollution of the waters and streams within the said drainage basin, constituting a grave menace to the health, welfare, and recreational facilities of the people living in such basin, and occasioning great economic loss; and

"Whereas, the control of future pollution and the abatement of existing pollution in the waters of said basin are of prime importance to the people thereof, and can best be accomplished through the cooperation of the States situated therein, by and through a joint or common agency;

"Now, Therefore, The States of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee, and West Virginia do hereby covenant and agree as follows:

ARTICLE I

"Each of the signatory States pledges to each of the other signatory States faithful cooperation in the control of future pollution in and abatement of existing pollution from the rivers, streams, and waters in the Ohio River basin which flow through, into or border upon any of such signatory States, and in order to effect such object, agrees to enact any necessary legislation to enable each such State to place and maintain the waters of said basin in a satisfactory sanitary condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances due to floating solids or sludge deposits, and adaptable to such other uses as may be legitimate.

ARTICLE II

"The signatory States hereby create a district to be known as the 'Ohio' River Valley Water Sanitation Dis-

trict,' hereinafter called the District; which shall embrace all territory within the signatory States, the water in which flows ultimately into the Ohio River, or its tributaries.

"ARTICLE III

"The signatory States hereby create the 'Ohio' River Valley Water Sanitation Commission,' hereinafter called the Commission, which shall be a body corporate, with the powers and duties set forth herein, and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the signatory States or by act or acts of the Congress of the United States.

"ARTICLE IV

"The Commission shall consist of three commissioners from each State, each of whom shall be a citizen of the State from which he is appointed, and three commissioners representing the United States Government. The commissioners from each State shall be chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed, and any commissioner may be removed or suspended from office as provided by the law of the State from which he shall be appointed. The commissioners representing the United States shall be appointed by the President of the United States, or in such other manner as may be provided by Congress. The commissioners shall serve without compensation, but shall be paid their actual expenses incurred in and incident to the performance of their duties; but nothing herein shall prevent the appointment of an officer or employee of any State or of the United States Government.

"ARTICLE V

"The Commission shall elect from its number a chairman and vice chairman, and shall appoint, and remove or discharge, such officers and legal, clerical, expert and other assistants as may be required to carry the provisions of this compact into effect, and shall fix and determine their duties, qualifications and compensation. It shall

adopt a seal and suitable by-laws, and shall adopt and promulgate rules and regulations for its management and control. It may establish and maintain one or more offices within the District for the transaction of its business, and may meet at any time or place. One or more commissioners from a majority of the member States shall constitute a quorum for the transaction of business.

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

"The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be duly constituted for that purpose.

"On or before the first day of December of each year, the Commission shall submit to the respective governors of the signatory States a full and complete report of its activities for the preceding year.

"The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof."

"ARTICLE VI

"It is recognized by the signatory States that no single standard for the treatment of sewage or industrial wastes is applicable in all parts of the District due to such variable factors as size, flow, location, character, self-purification, and usage of waters within the District. The guiding principle of this compact shall be that pollution by sewage or industrial wastes originating within a signatory State shall not injuriously affect the various uses of the interstate waters as hereinbefore defined."

"All sewage from municipalities or other political subdivisions, public or private institutions, or corporations,

discharged or permitted to flow into these portions of the Ohio River and its tributary waters which form boundaries between, or are contiguous to, two or more signatory States, or which flow from one signatory State into another signatory State, shall be so treated, within a time reasonable for the construction of the necessary works, as to provide for substantially complete removal of settleable solids, and the removal of not less than forty-five per cent (45%) of the total suspended solids; provided that, in order to protect the public health or to preserve the waters for other legitimate purposes, including those specified in Article I, in specific instances such higher degree of treatment shall be used as may be determined to be necessary by the Commission after investigation, due notice and hearing.

"All industrial wastes discharged or permitted to flow into the aforesaid waters shall be modified or treated, within a time reasonable for the construction of the necessary works, in order to protect the public health or to preserve the waters for other legitimate purposes, including those specified in Article I, to such degree as may be determined to be necessary by the Commission after investigation, due notice and hearing.

"All sewage or industrial wastes discharged or permitted to flow into tributaries of the aforesaid waters situated wholly within one State shall be treated to that extent, if any, which may be necessary to maintain such waters in a sanitary and satisfactory condition at least equal to the condition of the waters of the interstate stream immediately above the confluence.

"The Commission is hereby authorized to adopt, prescribe and promulgate rules, regulations and standards for administering and enforcing the provisions of this article.

ARTICLE VII.

"Nothing in this compact shall be construed to limit the powers of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

ARTICLE VIII

"The Commission shall conduct a survey of the territory included within the District, shall study the pollution problems of the District, and shall make a comprehensive report for the prevention or reduction of stream pollution therein. In preparing such report, the Commission shall confer with any national or regional planning body which may be established, and any department of the Federal Government authorized to deal with matters relating to the pollution problems of the District. The Commission shall draft and recommend to the governors of the various signatory States uniform legislation dealing with the pollution of rivers, streams and waters and other pollution problems within the District. The Commission shall consult with and advise the various States, communities, municipalities, corporations, persons, or other entities with regard to particular problems connected with the pollution of waters, particularly with regard to the construction of plants for the disposal of sewage, industrial and other waste. The Commission shall, more than one month prior to any regular meeting of the legislature of any State which is a party thereto, present to the governor of the State its recommendations relating to enactments to be made by any legislature in furthering the intents and purposes of this compact.

ARTICLE IX

"The Commission may from time to time, after investigation and after a hearing, issue an order or orders upon any municipality, corporation, person, or other entity discharging sewage or industrial waste into the Ohio River or any other river, stream or water, any part of which constitutes any part of the boundary line between any two or more of the signatory States, or into any stream any part of which flows from any portion of one signatory State through any portion of another signatory State. Any such order or orders may prescribe the date on or before which such discharge shall be wholly or partially discontinued, modified or treated or otherwise disposed of. The Commission shall give reasonable notice of the time and place

of the hearing to the municipality, corporation or other entity against which such order is proposed. No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state.

It shall be the duty of the municipality, corporation, person or other entity to comply with any such order issued against it or him by the Commission, and any court of general jurisdiction or any United States district court in any of the signatory States shall have the jurisdiction, by mandamus, injunction, specific performance or other form of remedy, to enforce any such order against any municipality, corporation or other entity domiciled or located within such State or whose discharge of the waste takes place within or adjoining such State, or against any employe, department or subdivision of such municipality, corporation, person or other entity; provided, however, such court may review the order and affirm, reverse or modify the same upon any of the grounds customarily applicable in proceedings for court review of administrative decisions. The Commission or, at its request, the Attorney General or other law enforcing official, shall have power to institute in such court any action for the enforcement of such order.

"ARTICLE X"

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States, one-half of such amount to be prorated among the several States in proportion of their population within the District at the last preceding federal census, the other half to be prorated in proportion to their land area within the District.

"ARTICLE XI

"This compact shall become effective upon ratification by the legislatures of a majority of the States located within the District and upon approval by the Congress of the United States; and shall become effective as to any additional States signing thereafter at the time of such signing."

SEC. 2. Without further submission of said compact, the consent of Congress is hereby given to the State of Virginia or any other State with waters in the Ohio River drainage basin, entering into said compact as a signatory State and party in addition to the States therein named or any of them.

SEC. 3. The commissioners to represent the United States, as provided in article IV of said compact, shall be appointed by the President.

SEC. 4. Nothing contained in this Act or in the compact herein approved shall be construed as impairing or affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area or waters which are the subject of such compact.

SEC. 5. The right to alter, amend, or repeal the provisions of section 1 is hereby expressly reserved.

Approved, July 11, 1940.—

APPENDIX C**CHAPTER 38**

(House Bill No. 369—By Mr. Brotherton)

AN ACT approving, ratifying and enacting into law the "Ohio River Valley Water Sanitation Compact" for the prevention, abatement and control of pollution of the rivers, streams and waters in the Ohio river drainage basin and making the state of West Virginia a party thereto; creating the "Ohio River Valley Water Sanitation Commission"; providing for the members of such commission from the state of West Virginia; and providing for the carrying out of said compact.

(Passed March 11, 1939; in effect ninety days from passage. Approved by the Governor.)

SECTION

1. Ohio river valley water sanitation compact approved.
2. Appointment of members of Ohio river valley water sanitation commission; state commissioner of health to be a member ex officio.
3. Powers of commission; duties of state officers, departments, etc.; jurisdiction of circuit courts; enforcement of act.
4. Powers granted herein supplemental to other powers vested in commission.
5. Expenses of commission; appropriations; officers and employees; meetings.
6. When to become effective.

Be it enacted by the Legislature of West Virginia:

Section 1. Ohio River Valley Water Sanitation Compact Approved. The following Ohio River Valley Water Sanitation Compact, which has been negotiated by representatives of the states of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee and West Virginia, is hereby approved, ratified, adopted, enacted into law, and entered into by the state of West Virginia as a party thereto and signatory state, namely:

(At this point in the Act appears the verbatim text of the Ohio River Valley Water Sanitation Compact which has already been set forth as a part of Appendix B.)

Section 2. Appointment of Members of Ohio River Valley Water Sanitation Commission: State Commissioner of Health to be Ex Officio Member. In pursuance of article four of said compact, there shall be three members of the "Ohio River Valley Water Sanitation Commission," from the state of West Virginia. The governor, by and with the advice and consent of the Senate, shall appoint two persons as two of such commissioners, each of whom shall be a resident and citizen of this state. The terms of one of the said two commissioners first appointed shall be three years and of the other shall be six years; and their successors shall be appointed by the governor, by and with the advice and consent of the Senate for terms of six years each. Each commissioner shall hold office until his successor shall be appointed and qualified. Vacancies occurring in the office of any of such commissioner from any reason or cause shall be filled by appointment by the governor, by and with the advice and consent of the Senate, for the unexpired term. The third commissioner from this state shall be the commissioner of health ex officio, and the term of any such ex officio commissioner shall terminate at the time he ceases to hold said office of commissioner of health, and his successor as a commissioner shall be his successor as said commissioner of health. With the exception of the issuance of any order under the provisions of article nine of the compact, said ex officio commissioner may delegate, from time to time, to any deputy or other subordinate in his department or office, the power to be present and participate, including voting, as his representative or substitute at any meeting of or hearing by or other proceeding of the commission. The terms of each of the initial three members shall begin at the date of the appointment of the two appointive commissioners, provided the said compact shall then have gone into effect in accordance with article eleven of the compact; otherwise shall begin upon the date which said compact shall become effective in accordance with said article eleven.

Any commissioner may be removed from office by the governor.

Section 3. Powers of Commission; Duties of State Officers, Departments, etc.; Jurisdiction of Circuit Courts;

Enforcement of Act. There is hereby granted to the commission and commissioners thereof all the powers provided for in the said compact and all the powers necessary or incidental to the carrying out of said compact in every particular. All officers of this state are hereby authorized and directed to do all things falling within their respective provinces and jurisdiction necessary to or incidental to the carrying out of said compact in every particular; it being hereby declared to be the policy of this state to perform and carry out the said compact and to accomplish the purposes thereof. All officers, bureaus, departments and persons of and in the state government or administration of this state of West Virginia are hereby authorized and directed at convenient times and upon request of the said commission to furnish the said commission with information and data possessed by them or any of them and to aid said commission by loan of personnel or other means lying within their legal powers respectively.

The circuit courts of this state are hereby granted the jurisdiction specified in article nine of said compact, and the attorney general or any other law-enforcing officer of this state is hereby granted the power to institute any action for the enforcement of the orders of the commission as specified in said article nine of the compact.

Section 4. Powers Granted Herein Supplemental to Other Powers Vested in Commission. Any powers herein granted to the commission shall be regarded as in aid of and supplemental to and in no case a limitation upon any of the powers vested in said commission by other laws of this state or by the laws of the states of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee, or by congress or the terms of said compact.

Section 5. Expenses of Commission; Appropriations; Officers and Employees; Meetings. The commissioners shall be reimbursed out of moneys appropriated for such purposes, all sums which they necessarily shall expend in the discharge of their duties as members of such commission.

There shall be appropriated to the commission out of any moneys in the state treasury unexpended and available therefor, and not otherwise appropriated, such sums as

may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportion of the state of West Virginia of the annual budget of the "Ohio River Valley Water Sanitation Commission" in accordance with article ten of said compact.

The commission shall elect from its membership a chairman and may also select a secretary who need not be a member. The commission may employ such assistance as it may deem necessarily required, and the duties of such assistants shall be prescribed and their compensation fixed by the commission and paid out of the state treasury out of funds appropriated for such purposes upon the requisition of said commission.

The commission shall meet at such times and places as agreed upon by the commissioners or upon call of its chairman.

Section 6. When Act to Become Effective. This act shall take effect and become operative and the compact be executed for and on behalf of this state only from and after the approval, ratification, and adoption, and entering into thereof by the states of New York, Pennsylvania, Ohio, and Virginia.

APPENDIX D

THE CONSTITUTION OF WEST VIRGINIA ARTICLE X

Taxation and Finance

1. Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants, one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the Legislature shall further provide by general law for increasing the maximum rates authorized to be fixed by the different levying bodies upon all classes of property by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty percent of the qualified voters shall favor such increase, and such increase shall not continue for a longer period than three years at any one time, and shall never exceed by more than fifty percent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be apportioned by the Legislature among the levying units of the State in proportion to the levy laid in said units upon real and other personal property; but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries,

public property, the personal property, including live stock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. The Legislature shall have authority to tax privileges, franchises and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the Legislature may provide. After the year nineteen hundred thirty-three, the rate of the state tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the State now existing.

(This section, prior to its amendment, read as follows: "Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries and public property may, by law, be exempted from taxation. The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.")

The amendment as above set forth was proposed by House Joint Resolution No. 3, adopted August 6, 1932 (Acts Ex. Sess. 1932, p. 16) and was ratified at the general election in 1932. Vote on the amendment: For ratification, 335,482; against ratification, 43,931; majority 291,551.)

Capitation Tax

2. The Legislature shall levy an annual capitation tax of one dollar upon each male inhabitant of the State who has attained the age of twenty-one years, which shall be annually appropriated to the support of free schools. Per-

sons afflicted with bodily infirmity may be exempted from this tax.

Receipts and Expenditures of Public Monies

3. No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the Auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated or provided. A complete and detailed statement of the receipts and expenditures of the public monies shall be published annually.

Limitation on Contracting of State Debt

4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

Power of Taxation

5. The power of taxation of the Legislature shall extend to provisions for the payment of the State debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State, but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year.

Credit of State Not to Be Granted in Certain Cases

6. The credit of the State shall not be granted to, or in aid of any country, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or asso-

ciation in this State or elsewhere, formed for any purpose whatever.

Duties of County Authorities in Assessing Taxes

7. County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation except for the support of free schools; payment of indebtedness existing at the time of the adoption of this Constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three-fifths of all the votes cast for and against it.

Bonded Indebtedness of Counties, Etc.

8. No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years: Provided, That no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same.

Municipal Taxes to Be Uniform

9. The Legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 147

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER and W. W. JENNINGS, Commissioners for the State of West Virginia to The Ohio River Water Sanitation Commission, D. Jackson Savage, Chairman of the State Water Commission of the State of West Virginia, and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming, and Dr. C. F. McClinic, Members of the State Water Commission,
Petitioner,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION
TO ALLOWANCE OF WRIT OF CERTIORARI**

CHARLES C. WISE, JR.,
Charleston, West Virginia,
Attorney for Respondent.

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Petitioner,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent.

**BRIEF OF RESPONDENT OPPOSING THE
ALLOWANCE OF A WRIT OF CERTIORARI**

JURISDICTION

Petitioner predicates its contention that this Court has jurisdiction of this proceeding on *Delaware River Joint Toll Bridge Commission v. Colburn*, (1940) 310 U. S. 419, 84 L. ed. 1287, which held that the construction of an interstate Compact sanctioned by the Congress " * * * involves a Federal title, right, privilege or im-

munity which, *when specially set up and claimed in a state court, * * ** could be reviewed by this Court on certiorari. (Italics supplied.)

Petitioner further contends that "This Compact, by the sanction of Congress has become a law of the Union." (Petitioner's brief p. 22.) This latter contention is not urged. The case of *Hinderlider v. La Plata R. & Cherry Creek D. Co.*, (1938) 304 U. S. 92, 82 L. ed. 1203, expressly upheld a long line of decisions of this Court unequivocally deciding that the consent of Congress to a Compact between states does not make it a "treaty or statute of the United States" within the meaning of the Judicial Code.

The controlling law of this Court is clearly and succinctly stated in *Henderson v. Delaware River Joint Toll Bridge Commission*, (1949) 362 Pa. 475, 66 A. 2d 843.

"The inhibition of Article I, Sec. 10, cl. 3, of the Constitution that 'No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State * * *' presupposes *State* action in the premises. And, while consent of Congress is required in the circumstances to validate the *State* action, it continues, nonetheless, to be *State* action. In *People v. Central Railroad*, 12 Wall. 455, 456, 20 L. Ed. 458, 79 U. S. 455, 20 L. Ed. 458, it was held that the consent of Congress to a compact between States did not make the compact a statute of the United States so as to justify a writ of error to a *State* court on the ground that a *statute* of the United States was thereby drawn in question. Nor does the case of *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U. S. 419, 60 S. Ct. 1039, 1041, 84 L. Ed. 1287, which the intervenors cite, derogate from the principle presently pertinent. It is true that in the *Colburn* case the ruling in

People v. Central Railroad, *supra*, was modified to the extent that jurisdiction of a case involving a compact between States was taken on certiorari by the United States Supreme Court, *not*, however, because of a *statute* of the United States was thus drawn in question, but because the congressional sanction of the compact under Article I, sec. 10, cl. 3, of the Constitution "involves a federal "title, right, privilege or immunity" which, when set up in a State court, may be reviewed in the Supreme Court on certiorari by virtue of Section 237(b) of the Judicial Code, 28 U. S. C. A. § 344 (now § 1257)."

Petitioner does not and can not bring the instant controversy within the jurisdictional requirements of the *Delaware River* case, *supra*.

Petitioner at no time "specially set up and claimed in a state court" any *Federal title, right, privilege or immunity*.

The petition filed in the state court, the forum of petitioner's choice, merely recites that the Congress approved the making of the Compact. At no place in the petition, in briefs or in argument did petitioner at any time set up or claim that any Federal title, right, privilege or immunity is involved in this proceeding.

The *Delaware River* case involved the *construction* of an interstate compact. Respondent contends that the Supreme Court of Appeals of West Virginia was not asked to consider or decide any question involving the *construction* of an interstate compact. - The majority opinion states "The sole question to be determined in this proceeding is the power of the Legislature of this State to enact Chapter 38, Acts of the Legislature, 1939." The majority and minority opinions of the West Virginia court are in agreement that the sole grounds upon which the Act of the West Virginia Legislature was declared

unconstitutional are (1) express provisions of the West Virginia Constitution dealing with internal fiscal affairs, and (2) an unconstitutional delegation of the sovereign police power of the State. The terms of the Compact in question are clear and unambiguous. The state court considered solely the question of the capacity of the West Virginia Legislature to enact Chapter 38, Acts of the Legislature, 1939. Of great significance is the fact that Section 3 of this Act, among other things, purported to grant to the Commission and the Commissioners individually " * * * all the powers provided for in the said Compact and all the powers necessary or incidental to the carrying out of said Compact in every particular." Furthermore Section 5 of the same act, going far beyond the language of the Compact, makes provision for appropriations to the Commission and the Commissioners individually and binds succeeding legislatures in perpetuity to appropriate funds for the payment of West Virginia's share of the budget of the Commission. Therefore it is apparent that the two grounds upon which the West Virginia Court held the statute to be unconstitutional arise not merely from language of the Compact, but also from additional provisions of the West Virginia statute which are found in that Act alone. (See Appendix C. Petitioner's Brief).

The Supreme Court of Appeals of West Virginia applied the clear mandate of the West Virginia Constitution and universally recognized constitutional principles to an Act of its Legislature. There is no federal question involved in a state court's application of its own constitution to an act of its legislature.

In the American governmental system a state constitution is the fundamental paramount law governing all departments of the state government. *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 P. 210; *Simpson v. Hill*, 128 Okla. 269, 263 P. 635, 56 A. L. R. 706.

This Court as well as state courts has recognized that one of the chief functions of a constitution is to limit the powers of the government and operate as a bulwark of liberty for the protection of the reserved rights of the people under both federal and state constitutions. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111; *State v. Arregui*, 44 Idaho 43, 254 P. 788, 52 A. L. R. 463.

Upon adoption of the Federal Constitution, the states retained all their original sovereignty except that surrendered to the Federal Government. *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 29 S. Ct. 580. The doctrine of a higher law than the constitution has no place in American jurisprudence. *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000.

Since the early days of this Court, it has been universally held that every state law must conform both to the Constitution of the United States and the constitution of the particular state, and if such enactment infringes upon either, the state statute is void. *Houston v. Moore*, 5 Wheat. (U. S.) 1, 5 L. ed. 19. Any act which a state constitution prohibits is beyond the power of the legislature, however proper it might be as a police regulation except for the constitution. *Wood v. Hamaduchi*, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861.

The cases relied upon by petitioner at pages 14 and 15 of its brief do not support the contention that the mere recital in the petition that the Congress had given approval to the Compact is sufficient to meet the requirement of specially setting up and claiming in a state court a Federal title, right, privilege or immunity. *Riley v. New York Trust Company*, 315 U. S. 343, 86 L. ed. 885, cited by petitioner, plainly reveals that express reliance at the trial was placed upon the full faith and credit clause of the Federal Constitution.

Respondent submits that contrary to petitioner's contention, an examination of the opinions of the Supreme Court of West Virginia will manifestly show that it did not assume that a Federal question was in issue and clearly the decision rested upon purely local constitutional grounds within the exclusive province of the highest court of the state to resolve.

Kentucky v. Indiana, 281 U. S. 163, 74 L. ed. 784, upon which petitioner relies, deals with an agreement between the states to construct a bridge. The defendant, Indiana, by answer expressly asserted it believed the contract to be valid although some of the citizens of that state sought to enjoin performance of the agreement upon unspecified grounds. Under such circumstances, this Court passed upon a *controversy between states within its original jurisdiction* under the principles governing such cases enunciated in *North Dakota v. Minnesota*, (1923) 263 U. S. 365, 68 L. ed. 342. No question as to the power of a state to enter into the Compact under its constitution was presented. Furthermore, the state court had not acted on the injunction sought by citizens thereof. As distinguished from the instant controversy where no controversy exists as between states, no question of construction of the Compact arises and the matter being limited to the consideration of the capacity of the state legislature under its constitution to enter into the Compact, it is plain that such case is neither applicable to nor decisive of this application.

Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, cited by petitioner, did not involve any question of the power and capacity of the legislature of a state under its constitution to enter into a compact upon the terms provided in an act, but dealt with the question of whether a new amendment to a state constitution impaired a pre-existing contract within the meaning of the contract clause of the federal constitution, which has always been

recognized as the most common example of a Federal title, privilege or immunity.

The rule has been long established that federal courts will follow the decisions of state courts as to the construction of state constitutions and that state courts are the final arbiters of questions of conformity of state statutes to the constitution of a state. *Glenn v. Field Packing Co.*, 290 U. S. 177, 78 L. ed. 252. *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151. Annotations: 63 L. R. A. 571 and 40 L. R. A. (N. S.) 609.

This court has held that it is without jurisdiction on certiorari to review holdings of a state court which concern matters of state law and amount, at most, to alleged erroneous construction of statutes or constitutions of a state by its own courts. *Neblett v. Carpenter*, 305 U. S. 297, 83 L. ed. 182.

A question of illegal delegation of legislative power to state bodies or officers or to the people does not raise a federal question but is a matter of local concern and for state courts. *Ohio Ex Rel. Davis v. Hildebrant*, 241 U. S. 565, 60 L. ed. 1172.

Respecting the fiscal affairs of a state, the decision of a state court holding unconstitutional a statute increasing the debt of the state involves no federal question for review. *Salomon v. Graham*, 15 Wall. 208, 21 L. ed. 37; *King v. West Virginia*, 216 U. S. 92, 54 L. ed. 396.

While other cases will be discussed hereinafter which have relevancy to the question of jurisdiction, it is respectfully submitted that, since petitioner neither set up nor claimed in the state court any Federal right, privilege or immunity and the state court did not consider nor decide any Federal question, this Court should not take jurisdiction of this proceeding and allow a writ.

THE CONSTITUTION OF WEST VIRGINIA GOVERNS THE POWER AND CAPACITY OF ITS LEGISLATURE TO ENACT AN INTERSTATE COMPACT.

At page 8 of its petition and brief, petitioner contends that the first question presented " * * * involves a conflict between certain language of the Constitution of West Virginia and the language of Article I, Section 10, Clause 3, of the Constitution of the United States * * *."

This theory of petitioner is without foundation to support it, and is counter to fundamental American concepts of law.

The states were sovereign entities prior to the adoption of the Constitution of the United States. Following the Declaration of Independence, there was no limitation whatsoever upon the right of any state to exercise the sovereign power of making an alliance or contract with any other state or country. The Articles of Confederation provided that no state should enter into an alliance or confederation. Later, when the Constitution of the United States was adopted, the language of the Articles of Confederation was in substance incorporated in the Constitution, Article I, Section 10, and in addition thereto, Clause 3 thereof provides that no state shall compact with another state without congressional approval. It is recognized that the reason for this limitation was to prevent compacts dealing with political matters and subjects within the proper sphere of the Federal Government and that in cases where such subjects were not involved, the states might, in the exercise of their reserved powers under the Tenth Amendment to the Constitution, compact with each other without congressional consent. *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 537. Other cases hold that congressional consent may be implied. *Wharton v. Wise*, 153 U. S. 155, 38 L. ed. 669; *Virginia v. West Virginia*, 11 Wall. 39, 20 L. ed.

67. Clearly the Congress cannot compel a state to compact with another, the only power granted to the Congress being that of rejecting any interstate compact which the states might desire to make. Manifestly there was and is no conflict between the Constitution of West Virginia and Article I, Section 10, Clause 3, of the Constitution of the United States.

The *Hinderlader* case, *supra*, (P. 1212 L. ed.) recognizes that an interstate compact is binding unless there was " * * * in the proceedings leading up to the compact or in its application some vitiating infirmity". This Court remarks that no such infirmity or illegality is shown, but by implication it is clear that by reason of the limitation of a state constitution there well could be some vitiating illegality which would render an interstate compact null and void. This position is further supported by *United States v. Bekins*, 304 U. S. 27, 82 L. ed. 1137, 1144, in which a statute is upheld because it " * * * is carefully drawn so as not to impinge upon the sovereignty of the state. The state retains control of its fiscal affairs."

The case of *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565, clearly indicates that a compact to be valid must comply with both the Constitution of the United States and the constitution of any state which joins therein.

"The states of the Union are restricted in their powers to make agreements with other States by the United States Constitution, as well as by various state constitutional provisions." Annotation 134 A. L. R. 1411, 1412 and cases there cited.

In 37 Michigan Law Review 129, 130, 131, (1938) commenting upon the *Hinderlader* case, *supra*, G. M. Stevens cogently states:

"Congressional assent does not make it a law of the United States. For the requirement of Congressional assent is not a grant of legislative power

to Congress, but a limitation on an inherent power of the States. This interpretation is particularly emphasized by the doctrine that not all compacts need Congressional ratification. It seems, then, that interstate compacts are essentially legislative acts of the signatory States and should be subject to the ordinary Constitutional restraints placed upon such legislation." (Italics supplied).

The Supreme Court of California upheld the creation of a state commission on interstate cooperation because its duties were properly limited to collecting information and making recommendations to the legislature. *Parker v. Riley*, 18 Cal. (2d) 57, 113 P. (2d) 873, 134 A. L. R. 1405.

In *New York v. Willcox*, 115 Misc. 351, 189 N. Y. S. 724, a compact between New York and New Jersey dealing with the important development of the Port of New York, was upheld because the joint Port Authority was merely authorized to prepare rules and regulations which each state should adopt and for the specific reason that each state retained strictly its own sovereignty, no control having been given to the Port Authority over any property belonging to either state or the citizens thereof.

Respondent cited in the State court the article by Frankfurter and Landis: "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L. J. 685, for the purpose of pointing out the history and nature of interstate compacts heretofore entered into and the possibilities of controlling the problem of pollution in the Ohio basin by a proper and lawful interstate compact. Petitioner now seeks to torture certain language found in this article into an implied support of its contentions at pages 19 and 20 of petitioner's brief, but clearly no consideration was there given to the power of a legislature to adopt a compact by legislation contrary to the state constitution.

It is likewise submitted that petitioner, (Brief p. 20), attempts a tortured construction of the *Hinderlider* case, *supra*. There the Supreme Court of Colorado purported to construe an interstate compact and to hold it invalid because of the adjustment of interstate water rights by a process of bartering. This Court very properly reversed because of the false assumption by the Colorado court that a judicial decision of controverted claims is essential to the validity of a compact adjustment. Furthermore, the Colorado court's decree obviously could not bind another state or its citizens who were not parties to the suit. As distinguished from the instant controversy, there was no express constitutional provision of Colorado governing the question which the Colorado court sought to decide, and rights to an interstate stream being involved, there was clearly jurisdiction in this court.

Contrary to the position taken by petitioner at page 23 of its brief, respondent submits that if a state constitution cannot control the power of its legislature to enter into a compact, then state sovereignty is thereby extinguished for all practical purposes. Since colonial days the states have entered into many compacts, but in conformity to the requirements of their respective constitutions. There is no burden placed upon a state by requiring it to contract within its constitutional powers. To take the view of petitioner would lead to the conclusion that a state could barter away its legislative power, its judicial power, or executive power to another state or to the Federal Government or to a hybrid commission as was done in the instant Compact, and thus effectually destroy its sovereignty.

The consent of Congress to the negotiation of the Compact provides that no compact or agreement made thereunder shall be binding or obligatory upon any state unless and until it has been approved by the legislatures of each of the states whose assent is contemplated.

(Appendix A. Petitioner's brief.) This supports the general law that it is entirely up to each state whether it enters into the compact. Capacity to enter into a contract is, of course, essential to the validity of any contract. The capacity of the Legislature of the State of West Virginia is measurable and determinable solely by the Constitution of West Virginia as interpreted by the highest court of that state. This principle is believed to be so fundamental that a denial thereof would be tantamount to robbing each state of its sovereignty. Here no agreement was made because the Legislature of the State of West Virginia clearly had no capacity to contract as it purported to do. There is, accordingly, no valid contract for interpretation or construction insofar as the State of West Virginia is concerned.

**ARTICLE X, SECTION 4 OF THE CONSTITUTION OF
WEST VIRGINIA PLAINLY PROHIBITS THE ENACTMENT
OF CHAPTER 38, ACTS OF THE WEST VIRGINIA LEGISLA-
TURE, 1939.**

This article of the West Virginia Constitution, (Appendix D of petitioner's brief) covers Taxation and Finance, important matters recognized to be wholly of internal concern to the State of West Virginia. Section 4 unequivocally provides that "*No debt shall be contracted by this State, * * **" except for certain named purposes irrelevant to this issue. And further, that the payment of "*any liability except for ordinary expenses of the State shall be equally distributed over a period of at least twenty years.*" The words "debt" and "liability" are plainly used in the broadest sense, and without resort to rules of construction, it is manifest that the obligations of the Compact and Section 5 of Chapter 38, Acts of the Legislature 1939, fall within the prohibition of the West Virginia Constitution. The highest court of the State of West Virginia alone should pass upon a question re-

lating to its internal fiscal affairs. This is particularly true since the right of no other state or party has accrued under the Compact.

Petitioner quotes from *Bates v. State Bridge Commission*, 109 W. Va. 186, 153 S. E. 305. (Brief p. 27). The last clause of the quotation makes it clear that the State court has construed Article X, Section 4 of the constitution to cover any and all debts and liabilities. The holding is without restriction: "The debts against which the prohibition lies are those for which suit may be maintained or the state's revenues and resources pledged or sequestered."

The field of interstate compacts had already been explored and developed at the time of the adoption of this provision of the West Virginia constitution. If the people had desired to except such compacts, they could have done so and would have refrained from the broad language of the prohibition which permits no exclusion by implication.

Article X of the Compact (quoted at Page 30, Petitioner's brief) plainly and unmistakably constitutes an agreement to appropriate for salaries, office and other administrative expenses this state's part of the annual budget as determined by the Commission, composed of three members from each of the states signatory thereto and three from the Federal Government, and approved by the governors of such states. Petitioner urges that the provision for budgetary approval by the governors assures control of appropriations. Under the Constitution of West Virginia, no act of the governor can waive any constitutional provisions. A governor may do no more than recommend appropriations to the legislature. Plainly Article X of the Compact does not require the budget as determined by the Commission to be approved by the governor of each state which is a party to the

Compact. Therefore a concurrence of a *majority* of the governors would control and be decisive. Furthermore, Section 5 of Chapter 38, Acts of 1939, goes far beyond the obligations created by Article X and purports to bind future legislatures to make appropriations, not only for the purposes provided in Article X but for expenses and other items. Both the language of Article X and that of Section 5 are plainly in violation of the Constitution of West Virginia, which provides that "no debt" shall be incurred by the State or "any liability" paid except upon the basis provided therein.

As hereinbefore noted, federal and state courts uniformly recognize that the fiscal affairs of a state are matters of internal government and certainly within the limitations of unequivocal provisions of the state constitution and the interpretations thereof which are properly within the exclusive jurisdiction of the highest court of the state.

NO STATE IN THE AMERICAN UNION CAN CONSTITUTIONALLY ABRIDGE OR SURRENDER ITS SOVEREIGN POLICE POWER, NOR CAN ONE LEGISLATURE BIND ANOTHER IN THE EXERCISE OF SOVEREIGN LEGISLATIVE FUNCTIONS, AS CHAPTER 38, ACTS OF THE WEST VIRGINIA LEGISLATURE, 1939, PURPORTED TO DO.

The State Supreme Court held that the Act of the West Virginia Legislature resulted in an unauthorized surrender of the police power of the State. Section 1 of Article VI of the West Virginia Constitution, quoted in the majority opinion (R. p. 26), contrary to petitioner's contention (Brief p. 31), provides "The legislative power shall be vested in a Senate and House of Delegates. * * *" In accord with universal holdings of this and other courts, the very essence of legislative power and sovereignty is the police power which is reserved to the states. Such legislative power under plain constitutional

mandate cannot be surrendered or abridged in any manner. *State v. Bunner*, 126 W. Va. 280, 282, 27 S. E. 2d 823; *Mumpower v. Housing Authority*, 176 Va. 426, 11 S. E. 2d 732. See 1 Cooley's Constitutional Limitations (8th ed.) 436; 2 Cooley's Constitutional Limitations (8th ed.) 1223.

Chapter 38, Acts of the Legislature 1939, unconstitutionally purports to surrender to a hybrid commission the police power of the State in the following particulars:

1. After providing a standard in Article VI of the Compact to the effect that 45% of total suspended solids shall be removed by anyone discharging sewage into any water in the Ohio River basin within a reasonable time, the Commission is authorized to fix such higher degree of treatment as it may determine to be necessary. No standards are provided to guide the Commission in such matter. Respecting industrial wastes, unlimited discretion is given the Commission. Therefore, adequate legislative standards are not provided.
2. No provision is made requiring uniformity or generality in any order of the Commission; on the contrary, it appears that the Commission not only can but is expected to make such orders as it sees fit in each individual case.
3. The Commission is made the fact finder, the legislator of standards, the hearing tribunal, and furthermore it is authorized to carry out these functions under such rules and regulations as it may in its absolute discretion establish and there is no provision that such rules and regulations themselves shall be of uniform character and application. In short, the Commission is the investigator, the law-maker, the prosecutor and the judge to a degree unprecedented in an era which has sanctioned the grant to administrative bodies of vast powers.

4. Article IX of the Compact purports to grant to any court of general jurisdiction and any United States district court in any of the eight states signing the compact jurisdiction by extraordinary remedy to enforce any order of the commission against any person, public or private, " * * * domiciled or located within such state, or whose discharge of the waste takes place within or *adjoining such state*" * * *. (Italics supplied). This unprecedented grant of jurisdiction purports to authorize any Federal District Court in West Virginia or any court of general jurisdiction in that state to enforce an order against a person domiciled or located either in West Virginia or in any state adjoining West Virginia if such person or entity discharges waste from this or an adjoining state. This language of the Compact clearly attempts to grant extraterritorial jurisdiction to courts. If a person in West Virginia discharged waste in a tributary of the Ohio River and failed to obey an order of the Commission, he could, under the language quoted, be haled into any federal or state court of general jurisdiction in Pennsylvania, Ohio, Virginia or Kentucky, in addition to such courts of the state of his domicile. This provision of the Compact is a startlingly new concept of government wholly foreign to the American constitutional system, which recognizes that courts of a state are limited to the territory of that state.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565;

International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 161 A. L. R. 1057; and

Riverside etc. v. Menefee, 237 U. S. 189, 35 S. Ct. 579, 59 L. ed. 910.

Cf. *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318.

5. Section 3, Acts of the Legislature 1939, over and above the provisions of the Compact, purports to give the

same broad governmental powers not only to the Commission but to each commissioner, irrespective of the fact that 24 of them are neither residents nor officers of the State of West Virginia. In this connection, it should be noted that the Supreme Court of West Virginia holds in this case that the broad powers purported to be granted by the act in question would not be constitutional even if a purely state commission were involved.

6. Of great significance is the fact that the Commission, once established, owes no specific allegiance to any state or to the Federal government. The Commission is, in effect, a super-state with purportedly broad powers affecting the lives and property of citizens of many states.

7. No state legislature may bind or abridge the power of any future legislature respecting the exercise of its police and legislative powers. A majority of the commissioners forming the Commission are authorized to make any order in the premises they, in their absolute discretion, may see fit to do. It is true that a majority of the commissioners of a particular state may veto, in effect, an order against a person or entity domiciled in such state. Each commissioner, while appointed by a particular state or by the President as the case may be, owes no allegiance nor is he subject to the effective control of any state or of the Federal government. The so-called veto power which petitioner urges as the saving clause for the Compact may in practical effect amount to the greatest vice inherent in it. Improper tactics such as "log-rolling" may very well in practice determine what orders, if any, of the Commission are enforced. Such a practice would not comport with the American system of government, which in this instance at the very least would seem to require proper legislative standards and a definition of the duty owed by the commissioners.

to the Federal government and the respective states which they represent.

A reasonable effort has been made to examine the provisions of existing compacts of which there are many. None has been found containing any one of the unprecedented features heretofore pointed out, which are considered the vice of the Act in question. Many of the cases which have arisen respecting interstate compacts are annotated in 134 A. L. R. 1411. Most compacts deal with a specific tangible object such as boundaries, bridges or ports, or else provide for cooperation between the states. Generally, compacts providing for cooperation provide that commissioners from the respective states signatory thereto shall meet, agree upon and recommend to the legislatures of their respective states the adoption of uniform legislation covering the subject matter.

Cases heretofore cited hold that questions of delegation of the police power of a state are proper matters for the courts of such state to determine. It is believed that there can be no question but that here the Supreme Court of West Virginia not only determined, but properly so, that an unconstitutional surrender of the police power of the state is inherent in Chapter 38, Acts of the Legislature, 1939. This infirmity inheres not only in the Compact but in other sections of the West Virginia Act.

CONCLUSION

The questions raised and decided in this proceeding admittedly are of great public and general interest. It is of great concern to the people of all the states in the Ohio Basin, to know whether the West Virginia Legislature had capacity to pass the enabling legislation in question. But it should be noted that the West Virginia decision does not purport to consider the validity of the Compact as to any other state, recognizing that its validity

must be determined by the constitutions of the respective states which are parties thereto. It should be further recognized that the West Virginia decision does not place in jeopardy any proper interstate compact of the character heretofore entered into, the instant Compact being unique and unprecedented in scope.

The Compact in question has just recently been executed. It was not made to settle any pre-existing controversy or adjudicate conflicting rights of states or other parties. Its operation will be altogether prospective. The appropriation which the Supreme Court of West Virginia held to be unconstitutional is the first made under the Compact. No rights of any other state or party have accrued. The State Court did not attempt to consider or decide any such conflicting rights.

The Supreme Court of Appeals of West Virginia and this respondent are in complete accord with petitioner that interstate compacts, when properly drawn and within the powers of the contracting bodies, are laudable and offer rich possibilities for working out regional problems which states severally cannot solve. The control of pollution of the streams in the Ohio River basin is indeed a commendable object and suitable for an appropriate interstate compact. The states involved can readily agree to an appropriate modification of the instant Compact thereby conforming to the Constitution of West Virginia without impairing the effectiveness of the parties to deal with the subject. The significant point remains, however, that the instant controversy arises because Chapter 38, Acts of the Legislature, 1939, clearly conflicts with the Constitution of the State of West Virginia, and accordingly, the legislature of that state had no capacity to pass the questioned Act. However important the control of stream pollution may be, it is not nearly so grave a threat as the pollution of the Ameri-

can form of constitutional government by an Act containing the vices herein pointed out.

It is accordingly respectfully submitted for the reasons advanced, under established law, that a writ of certiorari should be denied.

CHARLES C. WISE, JR.,
Attorney for Respondent.

SUPREME COURT, U.S.

No. 147

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER, et al., etc., Petitioners,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent.

ON CERTIORARI TO THE SUPREME COURT OF
APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR RESPONDENT

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**ON CERTIORARI TO THE SUPREME COURT OF
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BRIEF FOR RESPONDENT

OPINIONS OF STATE COURT

The majority and minority opinions of the Supreme Court of Appeals of West Virginia appear at pages 14 and 32, respectively, of the Record, will be reported in 133 W. Va. [redacted], and are currently reported in 58 S. E. (2d) 766 and 777, respectively.

JURISDICTION

Petitioner invokes jurisdiction under 28 U. S. C. A. 1257(3).

The question of jurisdiction of this Court was briefed on application for certiorari. While Respondent does not concede the point of jurisdiction for the reasons as-

signed in his brief in opposition to the allowance of a writ of certiorari, he is not warranted in filing a motion to dismiss. However, it is respectfully urged that in view of Petitioner's apparent failure to state adequate grounds in support of jurisdiction under the rules that this Court may deem it proper to reconsider the jurisdictional issue because: (1) No Federal question of substance was in issue or decided; (2) In any event, Petitioner utterly failed to rely upon any Federal right, title, privilege or immunity; and (3) Even assuming a Federal question, the decision below rests upon adequate State grounds.

STATEMENT OF THE CASE

Petitioner's statement is intrinsically correct but incomplete. It significantly fails to note that Chapter 38, Acts of the West Virginia Legislature, 1939, not only purported to adopt the Ohio River Valley Water Sanitation Compact, but, in addition and supplemental thereto, said Act provided:

1. Section 3 granted not only to the Commission but to the Commissioners individually, twenty-four of whom are non-residents of the State, "all the powers provided for in the said compact and all the powers necessary or incidental to the carrying out of said compact in every particular";
2. Section 4 expressly provided that the powers granted by such Chapter are supplemental to and in aid of any powers vested in the Commission by the laws of any other State, the Congress, or the terms of the Compact; and
3. Section 5 thereof not only provided for reimbursement of the Commissioners, but binds future Legislatures in perpetuity by the provision that:

"There shall be appropriated to the commission out of any moneys in the state treasury unexpended and available therefor, and not otherwise

appropriated, such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportion of the state of West Virginia of the annual budget of the Ohio River Valley Water Sanitation Commission in accordance with article ten of said compact."

It was the whole of Chapter 38, Acts of the West Virginia Legislature, 1939, which the State Court held unwarranted and void, rather than Section I, which deals with the Compact itself.

ASSIGNMENT OF ERRORS

The brief for the Petitioner does not contain a specification of assigned errors but in lieu thereof poses four questions for consideration which are inaccurate and misleading and are not properly raised in this proceeding.

SUMMARY OF ARGUMENT

I.

The sole issue in this case is the right of the West Virginia State Court to apply its Constitution to Chapter 38 Acts of the West Virginia Legislature, 1939. This Act contains broad and unconstitutional provisions, going far beyond the terms of the Compact which such Act purported to ratify. The State Court passed upon the enabling act and not upon the Compact standing alone.

Neither the propriety nor the constitutionality of interstate compacts is in issue. Both the State Court and Respondent affirmatively recognize the desirability and necessity of interstate compacts, including a properly drawn compact to deal with the important problem of stream pollution in the Ohio River basin.

II.

The vitiating provisions of the Act are found in Sections 3 and 5 of Chapter 38, Acts of the Legislature, 1939.

in far greater degree than contained in the Compact itself. Section 3 surrenders unlimited police powers not only to the Commission but to the Commissioners individually. Section 5 purports to bind future Legislatures to appropriate funds without limit as to time. These "extra-compact" provisions of the enabling Act were properly held unconstitutional by the State Court because (1) Article X, Section 4, of the West Virginia Constitution prohibits *without exception* the incurring of a "debt" or "liability" for such purposes; and (2) the police power of the State cannot be abridged or delegated—either in perpetuity or without adequate legislative standards. The Act is void in both particulars.

III.

This Court will not review the judgment of a State Court where the validity of an act of a Legislature under the Constitution of that State was at issue. Conditions precedent to taking jurisdiction in such cases are: (1) that a federal right was in issue, (2) that such federal right was relied upon in the Court below and (3) that the decision of the State Court upon such federal right is properly assigned as error. Petitioner fails completely to meet these requirements. Furthermore, it is well established that this Court will not exercise its powers of judicial review where the judgment of a State Court rests upon adequate and independent State grounds. The rule has long been adhered to that a State Court is the final and exclusive arbiter of its internal fiscal affairs and of delegation of the police power of the State. Assuming that the State Court did give incidental consideration to the terms of the Compact, nevertheless there is no substantial ground for invoking the power of judicial review of this Court.

Moreover, Congressional consent to the making of the Compact does not eliminate the necessity of the West

Virginia Legislature's acting within the limits of its State Constitution; for under our federal system and the decisions of this and other Courts, an interstate compact must be drafted and entered into so as to conform to both the Federal and State Constitutions.

IV.

Petitioner's theories threaten State sovereignty and the Federal system. It is essential to maintain a proper balance between the Federal and State Governments; and yet, counter to all authority Petitioner asserts that the consent of Congress to a compact *per se* annihilates the force of State Constitutions, statutes and courts. Thereupon the Legislature becomes free without any limitation to compact at will. Carrying Petitioner's startling theory to its logical conclusion, it follows that the hybrid commission created by the Compact in question would likewise be beyond control of State law and such commission could exercise upon the people of the States involved its authoritarian powers. It is submitted that the very arguments used by Petitioner demonstrate conclusively the error of Petitioner's entire case.

This Court will not make a new contract for the States. Yet it is argued that by a multitude of suggested interpretations and constructions, the Compact can be "watered down" to conform to constitutional limitations. Not only does this view ignore the fact that it is the enabling Act which the State Court holds invalid, but, moreover, adoption of the many necessary interpretations to that end is tantamount to the making of a new contract between the parties by a court with terms and provisions not contemplated by the signatory States.

Respondent's sole interest is the performance of his sworn duty to see that the public funds of the State are expended only in accordance with the Constitution. The observance of this requirement is essential to the preser-

vation of the State government, and, in this instance, may lead to the drawing of a proper and more effective compact for alleviating the important problem of stream pollution in the Ohio basin and, at the same time, leave the States free to experiment with new devices to meet the ever changing problem.

ARGUMENT

I.

THE SOLE ISSUE IN THIS CASE IS THE RIGHT OF A STATE TO APPLY ITS OWN CONSTITUTION—NOT THE PROPRIETY OR CONSTITUTIONALITY OF COMPACTS.

I. The State Court did not hold the Compact unconstitutional.

Contrary to the views of Petitioner and *amici curiae*, who misconceive the holding of the State Court, the sole question here is the judicial review of an enabling Act of the West Virginia Legislature, which not only purports to ratify the Compact, but in addition obligates the State to surrender too much of its essential attributes of State sovereignty.

Chapter 38, Acts of the Legislature, 1939, contains verbatim the language of the Compact in the first section, but the same Act in four succeeding sections goes far beyond the Compact to provide for additional grants of the police power of the State of West Virginia and to bind, without limit as to time or otherwise, future Legislatures to make appropriations.

It is plain from the opinion of the Court that its decision involved only the narrow issue of the validity of the enabling Act itself and did not involve either the construction or constitutionality of the Compact as such.

The State Court unequivocally states: "The sole question to be determined in this proceeding is the power of the Legislature of this State to enact Chapter 38, Acts

of the Legislature, 1939." (R. p. 21). Furthermore, the Compact is not even mentioned in any of the syllabi, which under the West Virginia Constitution the Court is required to prepare of all the points adjudicated in each case.⁷ See Constitution of West Virginia, Article VIII, § 5.

Moreover, the opinion of the State Court quotes the relevant provisions of Section 3 of the Act which grants to the Commissioners individually all of the powers of the Compact and the additional ones provided in the enabling Act; and also, Section 5 thereof which binds future Legislatures of the State to appropriate "such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act * * *". (R. pp. 17, 18).

That the State Court, as was proper, examined the language of the Compact is not denied because it was incorporated in the enabling Act; but, the Court unmistakably holds that it is the enabling Act which constitutes an unwarranted exercise of legislative power, rather than any particular provision of the Compact. The terms of the Compact are but one part of the Act and such terms in comparison with the other provisions of the Act contain in far less degree the vices therein. Even if it be assumed that the State Court singled out provisions of the Compact itself, it is equally clear that the Court was not troubled by any problem of interpretation or construction, but merely took what would appear to all reasonable minds to be unmistakably plain and unambiguous provisions of the Compact and tested them in the light of the Constitution of West Virginia.

It thus appears that the State Court held the enabling Act beyond the power and capacity of its Legislature upon the totality of its terms and did not construe or pass upon the validity of the Compact as such.

2. Both the State Court and Respondent recognize the desirability and necessity of interstate compacts.

Interstate compacts as such are not in issue here, but rather whether the terms thereof must conform to our existing constitutional framework. Students of government have universally recognized that since colonial days interstate compacts have grown in both number and breadth of scope into an increasingly useful means of solving problems common to two or more States. See Frankfurter and Landis: "The Compact Clause of The Constitution—A Study In Interstate Adjustments", 34 Yale L. J. 685. The State Court likewise recognizes the propriety and necessity of interstate compacts, and specifically in this case concludes that:

"Here we have a most worthy enterprise, that of guarding against the pollution of our streams, and providing for the safety and health of our people by the restoration of our streams, to some extent, to their original purity, * * *. We realize that in this instance the purpose in view can only be worked out through cooperation between the states drained in whole or in part by the Ohio River and its tributaries." (R. pp. 31, 32).

Petitioner and *amici curiae* obfuscate the real issue by making broadside charges indicating that the State Court and Respondent are seeking to undermine and, in effect, destroy not only the Ohio Basin Compact, but also to impair the scores of compacts already in existence. These charges are wholly unwarranted. The facts are that Respondent, in support of his position in the State Court, not only cited and relied upon the article by Frankfurter and Landis, *supra*, for the purpose of showing how the important problem of pollution in the Ohio Basin could be controlled by a proper and lawful interstate compact, but in addition made reference to the many modern compacts now in existence, the terms of which without

question would be constitutional under the present holding of the Supreme Court of West Virginia. Most of the cases which have arisen respecting interstate compacts are annotated in 134 A. L. R. 1411. It is significant that generally such compacts for interstate cooperation provide that Commissioners from the respective States signatory thereto shall meet, agree upon and recommend to the Legislatures of such States the adoption of uniform legislation covering the subject matter. The typical compact does not contain any broad surrender of the police powers of a State, nor does it purport to bind the parties thereto in perpetuity to appropriate funds in support thereof in accordance with the budget fixed by the Commissions created thereby.

Respondent particularly relied in the State Court upon the Interstate Commission on the Potomac River Basin Compact, ratified two years after the Ohio Basin Compact, by West Virginia in Chapter 81, Acts of the Legislature, 1941, 33 U. S. C. A. 567b, 54 Stat. 748, as an outstanding example of a well-drawn contract. The powers of the Potomac Commission are clearly limited to the collection of technical data, making additional technical investigations, *cooperation* with the legislative agencies of the States to the Compact, the dissemination of public information and the recommendation of standards for treatment of sewage and industrial wastes to the proper authorities in each State which signed the Compact. The Potomac Basin Compact does not contain any purported delegation of police power to the Commission, contains no exercise of the State's police powers upon municipalities, industries and other public and private entities, no requirement as to the enactment of future legislation, no provision granting extra-territorial jurisdiction to the courts of this and other States and of the United States, no requirement as to loan of personnel, no pledge by the State to make future appropriations in perpetuity; and of

great significance, the Potomac Compact provides that after one year's notice to the Commission any State may withdraw from the Compact.

It cannot be gainsaid, therefore, that the decision of the State Court merely holds an enabling Act of its own Legislature to be unconstitutional and in nowise impairs the right of the State of West Virginia or any other State to enter into a properly drawn compact. The State Court, while recognizing fully the values and rich potentialities of the device of the interstate compact, at the same time reluctantly but necessarily concluded that the Legislature of West Virginia was bound to contract within the plain limitations of its State Constitution.

II.

THE STATE COURT IN REVIEWING THIS ENABLING ACT OF ITS LEGISLATURE PROPERLY HELD IT UNCONSTITUTIONAL.

I. Chapter 38, Acts of the West Virginia Legislature, 1939, created a debt and liability prohibited by Article X, § 4, of the Constitution of West Virginia.

Article X of the Compact provides: "The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States. ***"

Section 5 of Chapter 38, Acts of the Legislature, 1939, over and above the terms of the Compact, provides that:

"The commissioners shall be reimbursed out of moneys appropriated for such purposes, all sums which they necessarily shall expend in the discharge of their duties as members of such commission."

"There shall be appropriated to the commission out of any moneys in the state treasury unex-

pended and available therefor, and not otherwise appropriated, such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportion of the state of West Virginia of the annual budget of the 'Ohio River Valley Water Sanitation Commission' in accordance with article ten of said compact."

There is little doubt that the foregoing provisions are unconstitutional.

Article X of the West Virginia Constitution deals with the important subjects of taxation and finance. Section 4 provides:

"*No debt* shall be contracted by this State * * * (except for specifically named purposes, not including an interstate compact, and then makes the further provision that) * * * the payment of *any liability* other than for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years." (Italics supplied.)

The terms "no debt" and "any liability" are plainly used in their broadest generic sense and are not susceptible of an interpretation that will permit the Legislature to incur the obligations inherent in Chapter 38, Acts of the Legislature, 1939. The State Court expressly holds that the passage of such Act "bound future Legislatures to make appropriations * * * and * * amounts to the creation of a debt inhibited by Section 4 of Article X of our State Constitution". (R. p. 29.) Petitioner argues that the obligation created by the Compact is not technically a debt. Even assuming that such position is correct, the State Constitution in equally emphatic terms prohibits the incurring or payment of "any liability".

Petitioner, in seeking to support its erroneous position, quotes copiously from *Bates v. State Bridge Com-*

mission, 109 W. Va. 186, 153 S. E. 305, (1930). (Br. p. 20.) The very wording of this decision shows Petitioner to be in error. The last sentence of Petitioner's quotation is "The debts against which the prohibition lies are those for which suit may be maintained or the state's revenues and resources pledged or sequestered," and thus clearly reveals that there is no exception to the compelling language of the Constitution.

Moreover, Petitioner seeks to emasculate the obligations contained in Article X of the Compact by naively suggesting that they should be construed " * * * as merely a declaration on the part of each signatory State of the intention to seek and to assert every effort to obtain from its Legislature the periodic appropriation of its proportion. * * * ". (Br. p. 27.) Significantly, Petitioner is likewise careful to ignore the important provisions of Section 5 of Chapter 38, which plainly bound future Legislatures to appropriate funds contrary to the State Constitution.

2. The enabling Act unconstitutionally surrendered the sovereign police power of the States.

In accord with universal holdings of this and other Courts, the police power under our constitutional system is reserved to the States where it is exercisable by the legislative branch. This police power can neither be surrendered nor abridged.

State v. Bunner, 126 W. Va. 280, 282, 27 S. E. 2d 823;

Mumpower v. Housing Authority, 176 Va. 426, 11 S. E. 2d 732;

1 Cooley's Constitutional Limitations (8th ed.) 436;

2 Cooley's Constitutional Limitations (8th ed.) 1223.

The enabling Act in question supplemented the provisions of the Compact by providing not only that the Commission but the Commissioners individually should have "all the powers provided for in the said compact and all the powers necessary or incidental to the carrying out of said compact in every particular." The succeeding Section 4 of Chapter 38 emphasizes that additional powers are granted by the enabling Act beyond those provided in the Compact in aid of and supplemental to those vested in the Commission by the Compact, the laws of all other States signatory thereto and the Congress.

The enabling Act went beyond State constitutional limitations in surrendering the police power of West Virginia in the following particulars:

1. After providing a standard in Article VI of the Compact to the effect that forty-five per cent of total suspended solids shall be removed by anyone discharging sewage into any water in the Ohio River basin within a reasonable time, the Commission is authorized to fix such higher degree of treatment as it may determine to be necessary. No standards are provided to guide the Commission in such matter. As to industrial wastes, *unlimited discretion* is given the Commission. Therefore, adequate legislative standards are not provided under the rule of *State v. Bunner, supra*, p. 12, upon which Petitioner relies, and many other cases cited therein, in which the Court states:

"* * * We have held that, in creating administrative machinery for the regulation of a business, the legislature itself must set up standards and definite limitations under which the administrative body may act, and must leave to it only the power to regulate and prescribe details, which are to be measured by the 'standards' so established by the legislative act. * * *

2. No provision is made requiring uniformity or generality in any order of the Commission; on the contrary, it appears that the Commission not only can but is expected to make such orders as it sees fit in each individual case.

3. The Commission is made the fact finder, the legislator of standards, the hearing tribunal, and furthermore it is authorized to carry out these functions under such rules and regulations as it may in its absolute discretion establish and there is no provision that such rules and regulations themselves shall be of uniform character and application. In short, the Commission is the investigator, the law-maker, the prosecutor and the judge to a degree unprecedented in an era which has sanctioned the grant to administrative bodies of vast powers.

4. Article IX of the Compact purports to grant to any court of general jurisdiction and any United States District Court in any of the eight States signing the Compact jurisdiction by extraordinary remedy to enforce any order of the Commission against any person, public or private, "**** domiciled or located within such state, or whose discharge of the waste takes place within or adjoining such state * * *." (Italics supplied.) This unprecedented grant of jurisdiction purports to authorize any Federal District Court in West Virginia or any court of general jurisdiction in that State to enforce an order against a person domiciled or located either in West Virginia or in any State adjoining West Virginia if such person or entity discharges waste from this or an adjoining State. This language of the Compact clearly attempts to grant extra-territorial jurisdiction to courts. If a person in West Virginia discharged waste in a tributary of the Ohio River and failed to obey an order of the Commission, he could, under the language quoted, be haled into any Federal or State Court of general juris-

diction in Pennsylvania, Ohio, Virginia or Kentucky, in addition to such courts of the State of his domicile. This provision of the Compact is a startlingly new concept of government wholly foreign to the American constitutional system, which recognizes that courts of a State are limited to the territory of that State.

Pennoyer v. Neff, 94 U. S. 714, 24 L. ed. 565;

International Shoe Co. v. Washington, 326 U. S. 319, 161 A. L. R. 1057;

Riverside etc. v. Menefee, 237 U. S. 189, 59 L. ed. 910;

Cf. *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318.

5. Section 3, Chapter 38, Acts of the Legislature, 1939, over and above the provisions of the Compact, purports to give the same broad governmental powers not only to the Commission but to each Commissioner, irrespective of the fact that twenty-four of them are neither residents nor officers of the State of West Virginia. In this connection, it should be noted that the Supreme Court of West Virginia holds in this case that the broad powers purported to be granted by the Act in question would not be constitutional even if a purely State Commission were involved. (R. pp. 30, 31.)

6. The Commission in this instance, unlike the typical commission created in other compacts involving interstate cooperation, is expressly vested with very broad police powers affecting health, life and property of citizens of many States. This unique Commission as such is not a creature of any one State nor of the Federal Government, but in effect, is a super-sovereignty deriving its extraordinary powers from eight States and the Federal Government, subject to few, if any, limitations in the Compact and, if Petitioner's theories are to be

believed, not subject to the laws or Constitutions of any of the States.

7. No State Legislature may bind or abridge the power of any future Legislature respecting the exercise of its police and legislative powers.

In *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079 (1879), the Court considered this question and held:

"* * * If the Legislature that granted this charter had the power to bind the people of the State and all succeeding Legislatures * * * there is no doubt about the sufficiency of the language * * *."

"All agree that the Legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." (Italics supplied.)

It is equally well established that a State Legislature cannot part with the discretionary power of determining when, to what extent, and under what circumstances the police power may properly be exercised as was clearly attempted in the enabling Act in the instant controversy.

Texas etc. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789;

St. Louis etc. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611;

Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 28 L. ed. 585;

Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L. R. A. 1917D, 1040; and

See Annotation, 71 A. L. R. 604, and 11 Am. Jur. 983, Const'l Law, Sec. 254.

The so-called veto power which Petitioner urges as the saving clause for the Compact may in practical effect amount to the greatest vice inherent in it. Improper tactics such as "log-rolling" may very well in practice determine what orders, if any, of the Commission are enforced. Such a practice would not comport with the American system of government, which in this instance at the very least would seem to require proper legislative standards and a definition of the duty owed by the Commissioners to the Federal Government and the respective States which they represent.

Again, however, it is the broad language of the surrender of the State's police power to the Commissioners individually under Section 5 of the Act which accentuates the vice inherent in the Compact.

In an effort to escape the conclusion that the enabling Act "went too far and surrendered too much" as decided by the State Court, it is argued that the Compact should not be taken at its face value as being plainly without limit as to duration, but should be interpreted, irrespective of its terms, so as to permit withdrawal by any State at will or at least within a reasonable period of time. To adopt such argument is to do violence to the terms of the Compact and the enabling Act. Furthermore, it cannot be denied that this Court has uniformly held that interstate compacts once entered into within the limitations imposed by State Constitutions are within the protection of the contract clause of the Federal Constitution and will be specifically enforced within the original jurisdiction of this Court.

Virginia v. West Virginia, 246 U. S. 565, 62 L. ed. 883;

Olin v. Kitzmiller, 259 U. S. 260, 66 L. ed. 930;

Pennsylvania v. Wheeling Bridge Co., 13 How. 518, 14 L. ed. 249;

Richmonds etc. R. Co. v. Louisa R. Co., 13 How. 71, 14 L. ed. 55; and

Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547.

If any State defaulted under the instant Compact, Petitioner and *amici curiae* would be the first to urge that action be taken to hold the Compact perpetually binding and enforceable against such recalcitrant State. Both law and fact refute the theory that by construction can the enabling Act in question be sustained.

III.

THIS COURT WILL NOT REVIEW THE JUDGMENT OF A STATE COURT ON THE VALIDITY OF AN ACT OF ITS LEGISLATURE UNDER THE CONSTITUTION OF THAT STATE.

I. This Court does not take jurisdiction to review a decision of a State court where a Federal right has not been adequately assigned.

This Court will not review a decision of a State court unless it is clear that a Federal question was affirmatively presented to the State court and has been assigned as error. It is essential to the jurisdiction of the Court that it be shown upon the record that the highest court of a State has first been apprised of a Federal question; and there must be an explicit and timely insistence of a Federal right in the court below.

Charleston Federal Savings & Loan Association v. Alderson, 324 U. S. 182, 89 L. ed. 857;

Congress of Industrial Organizations v. McAdory, 325 U. S. 472, 89 L. ed. 1741.

As late as 1945 Mr. Justice Douglas unequivocally specifies the rule which this Court has always adhered to in this cogent language:

"* * * It is a well established principle of this Court that before we will review a decision of a

state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman v. Hanan*, 300 U. S. 14, 18, 81 L. ed. 476, 478, 57 S. Ct. 350; *Lynch v. New York*, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16"; *Williams v. Kaiser*, 323 U. S. 470, 76, 89 L. ed. 398, 401.

An analysis of collected cases on this point (see Annotation, 84 L. ed. 925) reveals that before this Court will review the decision of a State court on certiorari, Petitioner must assert and prove: (1) that a Federal question was raised below, (2) that this Federal question was decided, and (3) that the decision of the question was necessary to the determination of the case.

Petitioner utterly fails to comply with these well defined requirements expressly designated by the Court as conditions precedent to judicial review. It does not and cannot assert that a Federal question was raised below, for at no place in the Record does any claim of a Federal right appear. Now, for the first time, Petitioner attempts to invoke a Federal question and seeks vicariously to attribute it to the proceedings below, although any Federal right is conspicuously absent from the entire proceedings below. Nor can Petitioner validly claim that a Federal question was decided when the West Virginia Court specifically states that its decision is limited to passing on the validity of a State statute.

Moreover, it is a familiar rule, consistently followed, that in case of applications for certiorari to a State court, this Court will not pass upon or consider Federal questions not assigned as error or designated in the points to be relied upon, even though properly presented to and passed upon by the State court.

Flournoy v. Wiener, 321 U. S. 252, 88 L. ed. 708;

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 179, 82 L. ed. 1273;

National Licorice Co. v. National Labor Relations Bd., 309 U. S. 350, 357, 84 L. ed. 799, 807.

Nowhere in Petitioner's brief is there any specification of assignments of error as to what Federal rights were denied or misconstrued by the State Court. Rule 9 of this Court requires Petitioner in all cases to file assignments of error "which shall set out separately and particularly each error asserted", and paragraph 9 of Rule 13, requiring the statement of points to be relied upon, provides that "The Court will consider nothing but the points of law so stated." Petitioner ignores this mandate and fails to meet either the substantive or the procedural requirements for the adequate assignment of a Federal right.

2. This Court will not review judgments of State courts that rest upon adequate and independent State grounds.

Respondent respectfully contends that there were no Federal questions either raised or decided by the Court below. But should this contention not be accepted, the instant judgment should nevertheless not be reviewed by reason of separate but equally compelling rulings.

This Court has specifically held that where the decision of a State court may rest on either a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it.

Williams v. Kaiser, *supra*, p. 19;

Lynch v. New York, *supra*, p. 19; and

Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193.

Thus, even where there is a question of whether a Federal right is involved, the issue is resolved on non-Federal grounds if the judgment can be supported on adequate State grounds.

The reasons for this holding and the reluctance of this Court to exercise its powers of judicial review when confronted by such a problem are excellently stated in two leading opinions. In the case of *Herb v. Pitcairn*, 324 U. S. 118, 126, 89 L. ed. 790, 794, Mr. Justice Jackson states:

"This Court, from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall (US) 590, 636, 22 L. ed. 429, 444; *Berea College v. Kentucky*, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 S. Ct. 33; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 61 L. ed. 644, 648, 37 S. Ct. 318; *Fox Film Corp. v. Muller*, 296 U. S. 207, 80 L. ed. 158, 56 S. Ct. 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction."

Mr. Justice Frankfurter, dissenting in *Flournoy v. Wiener*; *supra*, p. 20, points out:

"We do not review a case from a state court which can be supported on a non-federal ground because federal authority ought not to intrude upon the domain of the States. This far-reaching political consideration was decisive even after the Civil War in settling the rule that not only do we not review a case from a state court that can rest on a purely state ground, but we do not even review state questions in a case that is properly here from a state court on a federal ground."

This rule that the Court will not review a State decision resting on an adequate and independent non-Federal ground remains inviolate even though the State court may have also summoned to its support an erroneous view of the Federal law. *Radio Station WOW v. Johnson*, 326 U. S. 120, 89 L. ed. 2092.

It is difficult to see how Petitioner can evade or distinguish this clear and specific rule in asking this Court to review the decision of the West Virginia Court. Petitioner bases his assertion of a Federal question upon an alleged construction of the Compact by the West Virginia Supreme Court. Such was not the case, as shown by the specific limitation of the holding to the constitutionality of the major vices inherent in the enabling Act. But even if there was incidental consideration of the Compact, the fact remains that the decision rests unequivocally upon non-Federal grounds: the capacity of a State Legislature to contract under its own Constitution, and hence falls squarely within the stated rule.

3. The State Court is final and exclusive arbiter of internal fiscal affairs and of delegation of the State's police power.

This Court has consistently held that it is without jurisdiction on certiorari to review holdings of a State court which concern matters of State law and amount, at most, to alleged erroneous construction of statutes or Constitutions of a State by its own courts. *Nebblett v. Carpenter*, 305 U. S. 297, 83 L. ed. 182, and cases cited *supra*, p. 21.

A question of illegal delegation of legislative power to State bodies or officers or to the people does not raise a Federal question but is a matter of local concern and for State courts. *Ohio Ex Rel. Davis v. Hildebrant*, 241 U. S. 565, 60 L. ed. 1172.

Respecting the fiscal affairs of a State, the decision of a State court holding unconstitutional a statute increases

ing the debt of the State involves no Federal question for review. *Salomon v. Graham*, 15 Wall. 208, 21 L. ed. 37; *King v. West Virginia*, 216 U. S. 92, 54 L. ed. 396.

Petitioner relies upon *Kentucky v. Indiana*, 281 U. S. 163, 74 L. ed. 784. (Br. p. 11). That case is not relevant here because the issue was squarely raised as to the validity of a compact between the two States for the construction of a bridge, and was brought in this Court to settle a controversy between States within its original jurisdiction upon the principles governing such cases, decided in *North Dakota v. Minnesota* 263 U. S. 365, 68 L. ed. 342. The defendant, Indiana, by answer admitted the validity of the compact, although some citizens of that State had sought to enjoin performance of the agreement upon wholly unspecified grounds. That case did not deal with the question of review of a State court's decision on the State constitutionality of an enabling act to make a compact. As distinguished from the instant controversy where no dispute exists between States, no question of the validity of a compact is involved and the issue being simply the capacity of the State Legislature under its Constitution to pass the enabling Act, it is plain that such case is neither applicable to nor decisive of the instant matter.

4. A State must compact in conformity with its Constitution, notwithstanding consent of Congress.

Petitioner misconceives the very essence of the Constitution of the United States dealing with the right of States to compact.

Article I, § 10, Clause 3 of the Constitution of the United States merely provides that "No State shall, without the Consent of the Congress, * * *, enter into any Agreement or Compact with another State, * * *." Manifestly, this provision does no more than require congressional consent to the formation of interstate compacts.

The Declaration of Independence established the sovereignty of the States and they were thereafter perfectly free and competent to compact with each other without restraint, save as provided in their own Constitutions. The Federal Constitution is not the source of the power of the respective States to contract with each other. Both historically and by its very phraseology Clause 3 is but a limitation upon the States requiring them merely to secure congressional consent before a compact is valid. This Court has recognized that the obvious reason for requiring congressional consent is to prevent the States from entering into political alliances or other encroachments in the Federal sphere and has properly considered consent as a matter that may be implied without formal act in many cases.

Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669;

Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537;

Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67.

The language of the Constitution does not permit of an interpretation whereby the Congress can, in effect, force or coerce a State to enter into a compact.

It is unthinkable in the instant case that the Congress and the parties to the Compact did not expect each State Legislature acting thereon to do so within the legitimate framework of its Constitution. The Legislature has no existence, no power or vitality of any kind except under and by virtue of the Constitution of the State of West Virginia. The State Constitution is the source of legislative power and provides general principles governing its action. For example, under the West Virginia Constitution a bill must be read upon three separate occasions before passage in order to be valid. Let us suppose that

in the enactment of the questioned statute this requirement had not been met, and under State law such enactment would be utterly void. Could the invalidity of the enabling Act be questioned under such circumstances? There is but one answer supported by reason and authority—the enabling Act in the instant case, irrespective of congressional consent (to the Compact, not the Act as a whole), was subject to constitutional limitations.

Petitioner relies heavily upon *Hinderlider v. LaPlata Co.*, 304 U. S. 92, 82 L. ed. 1203 (1938) (Br. p. 10); yet, this case recognizes that an interstate compact may not be constitutional if there is " * * * in the proceedings leading up to the compact or in its application some vitiating infirmity." The Court in that case remarks that no such infirmity or illegality is shown, but by implication it is clear that by reason of the limitation of a State Constitution there well could be some vitiating illegality which would render an interstate compact null and void. This position is further supported by *United States v. Bekins*, 304 U. S. 27, 82 L. ed. 1137, 1144, in which a statute is upheld because it " * * * is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs."

The case of *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565, clearly indicates that a compact to be valid must comply with both the Constitution of the United States and the Constitution of any State which joins therein.

"The states of the Union are restricted in their powers to make agreements with other states by the United States Constitution, as well as by various state constitutional provisions." Annotation 134 A. L. R. 1411, 1412, and cases there cited.

In 37 Michigan Law Review 129, 130, 131, (1938) commenting upon the *Hinderlider* case, *supra*, G. M. Stevens cogently states:

"Congressional assent does not make it a law of the United States. For the requirement of Congressional assent is not a grant of legislative power to Congress, but a limitation on an inherent power of the States. This interpretation is particularly emphasized by the doctrine that not all compacts need Congressional ratification. It seems, then, that *interstate compacts are essentially legislative acts of the signatory States and should be subject to the ordinary Constitutional restraints placed upon such legislation.*" (Italics supplied.)

The Supreme Court of California upheld the creation of a State commission on interstate cooperation because its duties were properly limited to collecting information and making recommendations to the Legislature. *Parker v. Riley*, 18 Cal. (2d) 57, 113 P. (2d) 873, 134 A. L. R. 1405.

In *New York v. Wilcox*, 115 Misc. 351, 189 N. Y. S. 724, a compact between New York and New Jersey, dealing with the important development of the Port of New York, was upheld because the joint Port Authority was merely authorized to prepare rules and regulations which each State should adopt and for the specific reason that each State retained strictly its own sovereignty, no control having been given to the Port Authority over any property belonging to either State or the citizens thereof.

Upon adoption of the Federal Constitution, the States retained all their original sovereignty except that surrendered to the Federal Government. *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615. As the Supreme Court of West Virginia has remarked, the doctrine of a higher law than the Constitution has no place in American jurisprudence. *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000.

IV.

PETITIONER POSES GRAVE THREATS TO STATE SOVEREIGNTY AND THE CONTINUED EXISTENCE OF THE FEDERAL SYSTEM.

Petitioner boldly asserts that if Congress approves an interstate compact State Constitutions automatically lose their force and vitality and, paradoxically, the Legislature, although the creature of the State Constitution, can validly pass legislation wholly without regard to prohibitions of the State Constitution. This notion of Petitioner, which is its major premise for reversal of the State Court, involves many novel features: first, it is claimed that the provisions of Article I, § 10, Clause 3 of the Federal Constitution, contrary to its very terms, must be read as an affirmative grant of power, free from any and all restraint of any kind, to the States to enter into interstate compacts, subject only to the necessity of congressional approval; secondly, that the Federal Constitution, so twisted in meaning, then necessarily takes precedence over all State statutes and Constitutions; and finally, that any attempt of a State to invoke its Constitution must fail because of conflict with the Constitution of the United States.

In fairness to Petitioner, it should be noted that its brief concédes that there are no cases expressing such doctrine. At the same time, Petitioner urges that its theory is supported inferentially by scholarly writings and decisions of this Court. Petitioner uproots from its context a quotation from the article by Frankfurter and Landis, *supra*, p. 8, and seeks to torture it favorably to Petitioner's view. Such quotation is in reality but an emphatic affirmation of the inherent sovereign powers of the States to compact under our Federal system, subject only to congressional approval.

The weakness and inconsistency of its theory is revealed by Petitioner's quotation from *Pennsylvania v. Wheeling & Belmont Bridge Co.*, *supra*, p. 17, (Br. p. 12) that: "This compact, by the sanction of Congress, has become a law of the Union." This dictum has been long since rejected and the very case upon which Petitioner places especial reliance, *Hinderlider v. LaPlata Co.*, *supra*, expressly upheld a long line of decisions unequivocally deciding that congressional consent does not make a compact a "statute of the United States" within the meaning of the Judicial Code.

Petitioner's argument that compacts can be practicable and effective only if it is unequivocally established (by this Court) that all of the States are vested with equal powers free and unlimited by their respective Constitutions and the decisions of their local courts ignores the very real fact that compacts have been practical and effective throughout our history, although drafted strictly within the limitations of both State and Federal Constitutions. Under Petitioner's theory, providing only that Congress gave consent, a group of States could ignore their respective Constitutions and the executive and judicial branches of their governments and by mere legislative action, free from all limitation of every kind, by interstate compact establish a revolutionary form of government consisting only of the legislative branch, membership in which could be upon a lifetime basis.

This Court will not make a new compact for the States by the process of spurious interpretation.

The urging upon this Court of a multitude of interpretations and constructions would seem to be a tacit recognition and admission that the Compact in its present form is in fact unconstitutional. These pleas for "watering-down" the terms of the Compact are, in the view of Respondent, irrelevant to the issue, which relates to the

capacity of the West Virginia Legislature to pass upon the whole of Chapter 38, Acts of the Legislature, 1939, and not merely the Compact which contains in far less degree the vices complained of. Moreover, it is plain that the Compact itself is free from such ambiguities as warrant invoking the canons of construction and interpretation. Certainly, the suggested interpretations are tantamount to the making of a new contract between the parties, which it is respectfully submitted this Court will not and should not do. The instant Compact, unlike many others, is not designed to settle an existing controversy, nor does it deal with conflicts between the States. On the contrary, its operation will be prospective and no rights have accrued thereunder. Under these circumstances, it would seem plain that the parties by simple amendment to the Compact can incorporate the suggested interpretations made in this case, thus bringing the Compact within the limitations of the Constitution of West Virginia and all the other States. *A fortiori* a proper enabling act is needed for the State of West Virginia.

The problem of controlling pollution in the Ohio River Basin will become increasingly difficult with the passage of time. Interstate compacts may or may not prove to be an effective device for dealing with that important problem.

If it is not effective, the States signatory thereto should be free to try other methods, and not be bound by the fossilized terms of an outworn compact. Each State must remain free to experiment with new devices to meet the ever changing problem. In this connection the *Water Pollution Control Act of 1948* urges the States to consider and adopt *uniform legislation* to deal with stream pollution. 62 Stat. 1155, Public Law 845, 80th Congress.

Respondent's sole interest in this case is that of performing his sworn duty to assure that the public funds of

West Virginia are expended solely in accordance with the Constitution and statutes of that State.[†] The observance of that duty is not only essential for the preservation of orderly and constitutional government, but it is submitted in this instance may lead to the formation of a proper and more effective Compact for purifying the waters of the Ohio Basin.

CONCLUSION

For the reasons and in accordance with the constitutional provisions and authorities relied upon, Respondent respectfully submits that the jurisdiction of this Court has been improperly invoked, and, moreover, the State Court should be affirmed on the merits.

CHARLES C. WISE, JR.,
Attorney for Respondent.

[†] Article VII, § 1 of the Constitution of West Virginia provides: "The executive department shall consist of a governor, secretary of state, state superintendent of free schools, auditor, treasurer, commissioner of agriculture and attorney general, * * *." These are state-wide elective offices.

The Code of West Virginia, 12-3-1 (Michie's 1949, § 1019) provides:

"Manner of Payment from Treasury; Form of Checks.— Every person claiming to receive money from the treasury of the State shall apply to the auditor for a warrant for same. The auditor shall thereupon examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, and for so much thereof as he shall find to be justly due from the State, if payment thereof be authorized by law, and if there be an appropriation not exhausted or expired out of which it is properly payable, he shall issue his warrant on the treasurer. * * *."

See *Robinson v. LaFollette*, 46 W. Va. 565, 568, 33 S. E. 288, which states: " * * * he (Auditor) is authorized to use discretion * * * and in passing on such claims he does not perform a mere ministerial duty * * *." (Italics supplied.) *Woodall v. Darst*, 71 W. Va. 350, 77 S. E. 264, holds: " * * *. The Auditor has the right to raise the constitutionality of the appropriation." See also *Huntington v. Worthen*, 120 U. S. 97, 30 L. ed. 588.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 147

THE STATE OF WEST VIRGINIA, at
the Relation of DR. N. H. DYER,
et al.,

Petitioner,

v.

EDGAR B. SIMS, Auditor of the State
of West Virginia,

Respondent.

BRIEF OF THE STATES OF OHIO, INDIANA, ILLINOIS, KENTUCKY, PENNSYLVANIA, AND NEW YORK, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE
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October Term, 1950

THE STATE OF WEST VIRGINIA, at
the Relation of DR. N. H. DYER,
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No. 147

EDGAR B. SIMS, Auditor of the State
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Respondent.

BRIEF OF THE STATES OF OHIO, INDIANA, ILLINOIS, KENTUCKY, PENNSYLVANIA, AND NEW YORK, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of the States of Ohio, Indiana, Illinois, Kentucky, Pennsylvania and New York, as ~~amicus~~ curiae, by the chief legal officers of these States under authority of Rule 27, paragraph 9, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari which has been filed in this case contains a full statement of the facts in-

volved and the proceedings in the Court below. Inclusion of a similar statement in this brief would be repetitious and would serve no useful purpose. Therefore, Petitioner's Statement of the Case will be adopted for the purposes of this brief, supplemented, however, by emphasizing the fact that each of the States on whose behalf this brief is being filed ratified and enacted into law the Ohio River Valley Water Sanitation Compact in complete reliance upon the ability of each of the other signatories, including the State of West Virginia, to do likewise. Petitioner's Statement of the Case should be further supplemented by calling the attention of the Court to the fact that, since the Ohio River Valley Water Sanitation Compact became effective, each of the States on whose behalf this brief is being filed has undertaken to carry out its respective responsibilities thereunder and has made its proportionate financial contribution to its administration in full expectation that each of the other signatories, including the State of West Virginia, could and would do likewise.

RULING OF THE COURT BELOW

Two opinions were filed in the Supreme Court of Appeals of West Virginia in this cause. The majority opinion (three Justices) was filed on April 4, 1950, (Record p. 14), and is reported in 133 West Virginia Reports, page not yet determined, and in 58 Southeastern Reporter, 2nd. Series, 766. A dissenting opinion (two Justices) was filed on April 12, 1950, (Record p. 32) and is reported in 133 West Virginia Reports, page not yet determined, and in 58 Southeastern Reporter, 2nd. Series, beginning at page 777.

In its judgment dismissing the Petitioner's application for writ of mandamus, the Supreme Court of Appeals of West Virginia held that the ratification of the Ohio River Valley Water Sanitation Compact by the legislature of that State was an unconstitutional legislative act, for the reason that it violated Article X, Section 4, of the Constitution of West Virginia, and for the further reason that it resulted in an unconstitutional delegation of police power. The Court then concluded that since this legislative ratification was unconstitutional, it followed that the appropriation by the legislature of West Virginia of funds for the use of the Ohio River Valley Water Sanitation Commission was improper and that Respondent was justified in refusing to honor the requisition which had been submitted to him for the issuance of a warrant authorizing such payment.

JURISDICTION OF THIS COURT

The ruling of the Supreme Court of Appeals of West Virginia directly involves the validity and the construction of the Ohio River Valley Water Sanitation Compact. This Compact was entered into by the States of New York, Kentucky, Indiana, Ohio, Illinois, West Virginia, Pennsylvania and Virginia, and was executed on behalf of said States on June 30, 1948, pursuant to enabling legislation adopted by each of said States. The consent and approval of Congress had been expressly given said interstate compact by Public-Number 739—Seventy-Sixth Congress, Chapter 581—Third Session, S. 3617, approved July 11, 1940.

Petitioner seeks to invoke the jurisdiction of this Court under Title 28, United States Code, Section 1257(3), by

virtue of a "title, right, privilege or immunity" having been "specially set up or claimed under the constitution *** of the United States," in the Court below.

The title, right, privilege or immunity which was specially set up and claimed in this case is the Ohio River Valley Water Sanitation Compact, the validity of which, as applicable to the State of West Virginia, has been denied by the judgment of the Court below, on grounds which have already been pointed out.

In *Delaware River Joint Toll Bridge Commission v. Colburn* (1940), 310 U. S. 419, a case involving construction of an interstate compact between Pennsylvania and New Jersey, Mr. Justice Stone said (p. 427):

"We granted certiorari, 308 U. S. 549, the questions of the construction of the compact between states and of the jurisdiction of this court being of public importance."

Further, in the opinion in this case the following language is found:

"In *People v. Central Railroad*, 12 Wall, 455, jurisdiction of this court to review a judgment of a state court construing a compact between the states was denied on the ground that the compact was not a statute of the United States and that the act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This decision has long been doubted, see *Hinderlider v. LaPlata Co.*, 304 U. S. 92, 110, note 12, and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, Sec-

tion 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege or immunity' which when 'specially set up and claimed' in a state court may be reviewed here on certiorari under Section 237(b) of the Judicial Code, 28 U.S.C. Sec. 344."

In *Hinderlider v. LaPlata River & Cherry Creek Ditch Company* (1938), 304 U. S. 92, 110, 82 L. Ed. 1202, 1212, 58 S. Ct. 803, the validity of an interstate compact between Colorado and New Mexico was objected to in the courts of Colorado on the ground that it violated the due process clauses of the Fifth and Fourteenth Amendments of the Federal Constitution and Section 25 of the Constitution of Colorado. The Supreme Court of Colorado in its judgment held that this compact was invalid in part on the ground that it violated the provisions of the state constitution.

Notwithstanding this fact this Court accepted jurisdiction in that case by writ of certiorari under Section 237(b) of the Judicial Code (Now 28 U.S.C. 1257 (3)). Accordingly, this Court may review the judgment of the Supreme Court of Appeals of West Virginia in this case notwithstanding the fact that state constitutional questions are involved in part; nor is this Court bound by the decision of the Court below with respect to state constitutional questions insofar as they relate to the validity of the compact here under consideration.

In *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784, a case involving the construction of a compact between those two states in which the original jurisdiction of this Court was invoked, this Court proceeded to a final deter-

mination of the case notwithstanding the fact that litigation was then pending in the state courts of Indiana in which the question of validity of the compact was raised on the ground that the action of the state of Indiana in ratifying the compact was "unauthorized and void." This is precisely the question raised in the instant case, it being claimed by Respondent that the action of the legislature of West Virginia in ratifying this interstate compact was unauthorized and void. In ruling on this question this Court (in *Kentucky v. Indiana*) said (p. 176):

" * * * this Court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either state, as well as of acts of Congress, which are said to authorize the contract, in no way affects the duty of this Court to act as final, constitutional arbiter in deciding the questions properly presented."

If this Court is the "final, constitutional arbiter" in questions relating to the construction of interstate compacts it would appear to be of small moment whether the case calling for construction of such an interstate compact comes before the Court by way of original jurisdiction or, as in the case at bar, by writ of certiorari.

Moreover, this Court, in proceeding to a final determination of the cause without awaiting determination of the litigation then pending in the Indiana courts, inferentially, at least, held that it had the authority to determine the question of the validity of this Compact re-

gardless of what the decision might be in the state courts as to the constitutionality of the action of the State of Indiana in ratifying such compact. This again is precisely the situation in the case at bar.

It is apparent from the majority opinion of the Supreme Court of Appeals of West Virginia that Federal questions of substance were necessarily involved in the decision of said court. This is made clear by the following portion of the opinion (58 S.E. 2nd., beginning at page 775, Record, page 28):

"As stated above, the thirteen colonies existing at the date of the Declaration of Independence became independent and sovereign states, and the states which have been since admitted into the Union, under the Constitution, are likewise independent and sovereign states, but all are subject to the powers delegated to the Federal Government by the original Federal Constitution, and the Amendments thereto adopted from time to time. After the adoption of our Constitution, any one of the thirteen states could have entered into a compact with another without any interference on the part of the

remainder of the other states. However, when our Federal Constitution was adopted, it was provided by Section 10 of Article I thereof that: 'No State shall, without the Consent of Congress * * *, enter into any Agreement or Compact with another State, * * *.'

"This provision, of course, recognized the right of the State to enter into compacts with other states, with the consent of the Federal Government, which could only be effected by an Act of Congress. This recognition of the right to make such compacts between states furnishes the basis for the jurisdiction of the Federal courts should a controversy arise between two or more states, as provided by Section 2 of Article III of the Constitution of the United States, by which Section it is also provided that in controversies to which a state shall be a party, the Supreme Court of the United States shall have original jurisdiction. All this being true, we are driven to the conclusion that if the challenged act and compact be upheld, the Legislature has, in all reasonable probability, bound future Legislatures to make appropriations for the continuation of the activities of the Sanitation Commission, and this, we think, amounts to the creation of a debt inhibited by Section 4 of Article X of our State Constitution." (Emphasis supplied.)

From the above quoted portion of its opinion, it is apparent that the Supreme Court of Appeals of West Virginia recognized the right of the state to enter into compacts with other states, as provided in the Constitution of the United States, but held, nevertheless, that such right was subject to state constitutional provisions,

Also, in holding that the legislative authorization for West Virginia to enter into the Ohio River Valley Water Sanitation Compact resulted in an unconstitutional delegation of police power, the Court stated (58 S. E. 2nd., beginning at page 776, Record, page 30):

“ * * * . This being true, when a Legislature undertakes to delegate to any citizen, any municipality, or any other agency of the government inside the State, in perpetuity, *or attempts to make a compact with another state or states, or with the Federal Government, by which it so delegates a part of its police power to be used within this state or outside this state, it attempts to do something which it does not possess the power to do.* * * * ” (Emphasis supplied.)

It is thus apparent that the Supreme Court of Appeals of West Virginia was of the opinion and held that an interstate compact, even though sanctioned by Congress, which directly related to matters embraced within the police power of West Virginia, was an unconstitutional delegation of police power. The implication from this holding is that any interstate compact, relating to the police power of a state, may be an unconstitutional delegation of police power, and thus be invalid.

The Supreme Court of Appeals of West Virginia thus considered and passed upon Federal questions in its opinion, and the decision thereon was a necessary part of the ruling of the Court. It has been held that a Federal question which was treated as open, and decided by the State Supreme Court, will be reviewed in the United States Su-

preme Court without inquiring whether its Federal character was adequately called to the attention of the state trial court. (*Hill v. Smith* (1923), 260 U. S. 592.)

In *Cissna v. Tennessee* (1918), 246 U. S. 289, at 293, the Court made the following statement:

"The record does not show that Cissna specially set up in the state courts any contention that the decision of the merits turned upon questions of federal law, except as this may appear by inference from the nature of the grounds upon which the decision was rested. But if the Supreme Court of the State treated federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised. *Miedreich v. Lauenstein*, 232 U. S. 236, 243; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 257; *Mallinckrodt Works v. St. Louis*, 238 U. S. 41, 49."

QUESTIONS PRESENTED

1. Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.
2. If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by the provisions of its own constitution, does Article X, Section 4, of the Constitution of the State of West Virginia restrict such power?

3. If Article X, Section 4 of the Constitution of the State of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the Ohio River Valley Water Sanitation Compact subject the State of West Virginia to any obligation in violation of the above mentioned Article and Section of its constitution?
4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the Legislature of the State of West Virginia resulted in an unconstitutional delegation of police power.

ARGUMENT

A. MATTERS OF GRAVE PUBLIC INTEREST ARE PRESENTED IN THIS CASE WHICH SHOULD BE REVIEWED AND DETERMINED BY THIS COURT.

Not only are the questions here presented Federal questions of substance which have not previously been determined by this Court as far as we are able to learn, but they are questions of great public and general interest.

The first involves a conflict between the constitution of West Virginia and the Compact Clause (Article I, Section 10, Clause 3) of the Constitution of the United States.

The second involves the determination of the validity of interstate compacts, a question with respect to which this Court is the "final, constitutional arbiter."

The third and fourth questions involve the construction of a specific interstate compact, which construction can only be made with finality by this Court.

The issues presented in this case are of grave significance. The several states participating in the filing of this brief as *amici curiae* are vitally interested in the stability of the Ohio River Valley Water Sanitation Compact. This interstate compact, designed to control the pollution of the Ohio River and its tributaries, is a matter of great public importance to a large geographical area of our country. The decision of the Supreme Court of Appeals of West Virginia, in holding that participation by West Virginia in said compact was unconstitutional, will vitiate the

compact as far as West Virginia is concerned. In order for the compact to be successful, all of the states in the Ohio River basin must be participants therein. Without West Virginia, a key state in the basin, the compact cannot achieve its purposes.

The principles stated in the West Virginia decision may be held applicable by state courts in other states which are parties to the Ohio River Valley Water Sanitation Compact. This interstate compact, entered into by the various states pursuant to the provisions of Article I, Section 10, Clause 3 of the Constitution of the United States, is thus subject to threat of complete abrogation. This compact, creating an interstate or quasi-Federal relation among the participating states, will thus stand or fall, not on a basis of Federal law, but on a basis of the interpretation by a state court of the organic law of the state and of the compact provisions.

A graver danger exists. The principles announced by the Supreme Court of Appeals of West Virginia may be held applicable to other compacts wherein various states have attempted to solve interstate problems by agreement. Courts of other states may use this West Virginia decision as a precedent to decide that any compact is in violation of the constitution of that state, and therefore void. The practical effect of the West Virginia decision will be that all interstate compacts will be subject to such varying interpretations as may be given to their provisions by the courts of the participating states. The validity of all interstate compacts will thus be shrouded in doubt. If interstate compacts, sanctioned by Congress, are to rest on such a shifting, unstable foundation, it is submitted that they will be of little value in solving interstate problems.

The compact device provides a workable and effective method for the solution of regional problems among the states. This has been clearly recognized by the court in many cases. In *New York v. New Jersey* (1921), 256 U. S. 296, at 313, the Court recommended the compact method as an effective way for New York and New Jersey to settle their differences in respect to the pollution of the waters of New York Bay, saying:

"We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

In *Colorado v. Kansas* (1943), 320 U. S. 383, at 392, the Court said:

"The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agree-

ment should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."

Although the Court has repeatedly recommended the compact method as being proper and effective to adjust and settle interstate problems, it is submitted that the value of the compact device will be lost if the power of a state to enter into an interstate compact may be limited by the provisions of the state constitution. Because of the uncertainty as to whether such compact is valid or not, it is believed that interstate compacts will fall into disuse, and states will be forced to litigation in order to settle their differences with other states. The import of the decision by the Supreme Court of Appeals of West Virginia will be to impair fatally the efficacy of the interstate compact as a means of settling and adjusting interstate or regional problems of states. Recommendations by the Court that the compact method be used to settle such problems (see footnote in *Colorado v. Kansas* (1943), 320 U. S. 383, at page 392) will thus be meaningless.

More important, however, even than this, is the possibility that this decision, if undisturbed, may well place in jeopardy a long list of compacts heretofore made by other states of the Union. The number of compacts alone is impressive. In 34 Yale Law Journal at page 735, there appears a list of 39 such interstate compacts which have been accomplished with the consent of Congress between the years 1789 and 1925. (*The Compact Clause of the Constitution—A study in Interstate Adjustments*). In the 1950 edition of the Book of the States (Council of State Governments) at page 26 there are listed 31 state compacts.

which have been accomplished with the consent of Congress during the period 1934 to 1939.

The parties to all these interstate compacts aggregate 38 states. An examination of the constitutions of these 38 states reveals that 21 of them contain both a debt limitation clause and a provision against pledging the credit of the state in language quite similar to that which is involved in the constitution of West Virginia. In the constitutions of 12 of such states there is found a provision against pledging the credit of the state in language similar to that of the West Virginia constitution. In the 5 remaining cases the state ~~constitutions~~ contain a debt limitation clause similar to that of West Virginia. Thus it is seen that in none of the states which are parties to the interstate compacts thus listed is the constitution wholly free of a provision with respect to which the decision of the Court below, if undisturbed, could be said to apply as a precedent; and it is conceivable, therefore, that grave doubt could be cast upon the validity of many of the compacts listed in the two publications cited above.

B. THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ERRONEOUSLY DETERMINED FEDERAL QUESTIONS OF SUBSTANCE IN THIS CASE.

1. *Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.*

The judgment of the Court below, in holding that West Virginia's ratification of the Ohio River Valley Water Sanitation Compact was a violation of a provision of the constitution of that state which prohibited the state from contracting a debt, would, if undisturbed, virtually prohibit that state from entering into any interstate compact, whatever since it is only in the rarest of cases that a party to such compact would not be called upon to bear a fair portion of the expense involved therein.

It is not believed possible for a state thus to cast away one of its most important attributes of sovereignty, for the history of interstate compacts clearly shows their essential nature as such. They were utilized during the colonial period with the assent and approval of the Crown. During the period following the Declaration of Independence interstate compacts were utilized by the several states with the consent of the Continental Congress. It seems beyond argument that the inclusion of the compact clause in the Constitution of the United States was not only intended to place a limitation on the powers of the states to exercise this attribute of sovereignty but was also intended to affirm the power, in this respect, which the states had theretofore possessed, subject to the sole and exclusive limitation that the Congress of the United States consent to its exercise, such consent being substituted for that of the King, and, later, that of the Continental Congress.

It is to be remembered that under Article VI, Clause 2, of the Constitution of the United States, the Federal Constitution and all laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Accordingly, when Public Resolution No.

104, Seventy-Fourth Congress, which gave assent to the compact here under consideration, provided that "no such compact or agreement shall be binding or obligatory upon any state a party thereto unless and until it had been approved by the legislatures of each of such states whose assent is contemplated by the terms of the compact or agreement and by the Congress," it necessarily followed that the method thus prescribed for ratification of the Compact by the states was the only proper one by which such ratification could be made effective, and that such legislative ratification became the only condition precedent to its becoming effective. It further follows that such Congressional act, under Article VI, Clause 2, became the supreme law of the land, anything to the contrary in the Constitution of West Virginia notwithstanding. See *Hawke v. Smith, Secretary of State of Ohio* (1920), 253 U. S. 221, 64 L. Ed. 871.

This conception of the supremacy of Federal law in the matter of interstate compacts is supported by the following language of Chief Justice White in *Virginia v. West Virginia* (1918), 246 U. S. 565, 62 L. Ed. 883, at pages 601 and 602 of the U. S. Report, where the scope and effect of Article I, Section 10, Clause 3, was stated in the following language:

"The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned

with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the Federal power. * * *

Any rule which would permit a State of the Union to place a constitutional restriction upon the power of its legislature to ratify an interstate compact would jeopardize the validity of virtually all such compacts now in existence, and would have the practical effect of virtually nullifying the inherent power to make such compacts which was expressly reserved to the states by Article I, Section 10, Clause 3. So considered, it can only be concluded that such a rule violates the Constitution of the United States and cannot be upheld.

• 2. *If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by the provisions of its own constitution, does Article X, Section 4, of the Constitution of the State of West Virginia restrict such power?*

In the event that this Court should hold that the provisions of a state constitution can properly limit the power of a state to enter into interstate compacts then it becomes necessary to a determination of this cause to decide whether Article X, Section 4, of the Constitution of West Virginia does in fact limit such power. In this respect this Court is not bound by the interpretation of this constitutional provision by the Supreme Court of Appeals of West Virginia under the rules established in *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.* (1938), 304 U. S. 92, 110, Note 12, 82 L. Ed. 1202, 1212, 58 S. Ct. 803, and in *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784, both cited hereinbefore.

The power of a state to make compacts with other states of the Union is an inherent power which the States possessed prior to admission to the Union under the United States Constitution. Upon the formation of the Federal Union, the Federal Constitution expressly guaranteed the continuation of such power in the several states, subject only to the requirement that it be exercised only with the consent and approval of Congress.

Article X, Section 4, of the West Virginia Constitution does not expressly deny or limit this inherent power. If it contains any such limitation of the power it must be by implication.

Article X, Section 4, purports to be only a limitation on the power of the legislature to regulate the fiscal affairs of the state. The idea that a provision relating to the ordinary fiscal affairs of the state was ever intended by the framers of this constitution or the people who adopted it virtually to deny to the state so important an attribute of sovereignty is one which strains the credulity of informed men, especially in view of the all too well known jealousy of sovereigns in guarding their powers.

Having in mind the importance of the power of the state in this respect as an attribute of sovereignty and considering the obviously narrow intended scope of Article X, Section 4, the conclusion that this constitutional provision, by implication, virtually destroys such attribute of sovereignty is indeed difficult to reach.

3. If Article X, Section 4 of the Constitution of the State of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the

Ohio River Valley Water Sanitation Compact subject the State of West Virginia to any obligation in violation of the above mentioned Article and Section of its constitution?

The prohibition of Article X, Section 4, of the Constitution of West Virginia against the contracting of any debt is subject to certain exceptions enumerated therein. Among these is "to meet casual deficits in the revenue."

The meaning of "casual deficits in the revenue" was considered by the Supreme Court of Appeals of West Virginia in *Dickinson v. Talbott* (1933), 114 West Virginia 1, 170 S. E. 425. In that case the Court had under consideration an attack on a legislative act authorizing a bond issued in the amount of five million dollars on the ground that it violated the provisions of Article X, Section 4, of the state constitution. In holding that act valid despite the constitutional limitation on the incurrence of a debt, the Court, speaking of the effect of this constitutional provision as applicable to legislative control of the state's fiscal affairs said, *inter alia*:

Page 5

"The state's constitutional requirements are for the preservation of the state and the maintenance of its integrity and for the protection of the people. Constitutional limitations must not be so construed as to be subversive of their very purpose. * * *

Page 7

"Apropos of both sections 4 and 5, Article X, West Virginia Constitution, it is not to be considered that the framers of our Constitution or the people of the state in ratifying and approving

the same, meant to place barriers in the path of the state officials and the legislators, so circumscribing the fiscal affairs of the state as to create impossibility of escape from embarrassing situations."

Page 8

"The state of West Virginia is sovereign save only as it has relinquished certain prerogatives to the federal government. In the exercise of the sovereign attribute of enacting laws the legislative power is inherent; therefore, in construing an act of the state legislature, reference must be had to the state and federal constitutions, not in search of a grant of power, but to ascertain if there is a limitation or restriction of power * * *. In the acts under consideration the legislature, in our judgment, has not violated any constitutional limitation of its authority but has properly acted under its broad and plenary power to provide for the welfare of the state."

It is easy to conclude that if these rules of constitutional interpretation had been applied in the instant case, the Court below could not have formed the decision which it did.

The conclusion of the Court below that the ratification of the compact here under examination did purport to create a debt in violation of Article X, Section 4, must necessarily have been based on a consideration of the provisions of the Compact itself. The only references made in the Compact to fiscal affairs appear in Article V and X, which read in part as follows:

"ARTICLE V

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

"The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be duly constituted for that purpose."

"The Commission shall not incur any obligation of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof."

"ARTICLE X

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the governors of the signatory States, one-half of such amount to be prorated among the several states in proportion to their population within the District at the last preceding Federal census, the other half to be prorated in proportion to their land area within the District."

As to Article V, the language clearly evinces a deliberate effort to renounce any notion of contravening the constitutional requirements, in fiscal affairs, of any of the signatory states. Clearly, the Court below could not have had anything in this Article in mind in reaching the conclusion it did.

There is, however, in Article X, what purports to be an agreement among the signatory states for the sharing of expenses of the project being established; and what purports to be an agreement to appropriate funds therefor.

Since it is virtually a universal rule that a particular legislature cannot be bound in advance to appropriate funds for particular purposes, it would appear that it is this provision in Article X of the compact which led the Court below to reach the conclusion it did.

Did this language of Article X actually create a debt within the meaning of Article X, Section 4, of the Constitution of West Virginia? Since a particular legislature cannot be legally bound in advance to make any particular appropriation of funds it is difficult to see how a "debt" could be created by such an "agreement." The practical interpretation to be given to such an "agreement" is that the executive officials of the several signatory states agreed to use their influence in urging such appropriations by future legislatures to the end that necessary funds would be provided.

The legal position of a signatory state under the language of Article X of the compact is no different than it would be when the legislature of such state authorizes

the construction of a state institution or the creation of a new department of the government. A moral obligation to provide funds in the future to maintain and support such institution or department certainly would be present even though no legal obligation might exist. In actual practice every state government in the Union, and the Federal government as well, operates continually on this basis, for governments as well as individuals must necessarily depend heavily on moral as well as legal obligations. In this respect it can truly be said that it is the moral quite as often as the legal obligation which gives life to the promises which governments and men live by.

Viewed in this light, the provisions of the compact and the West Virginia statute ratifying it and enacting it into law can and should be construed so as to uphold their constitutionality.

4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the Legislature of the State of West Virginia resulted in an unconstitutional delegation of police power or of legislative authority.

The judgment of the Court below, in holding that the ratification and enactment into law of the compact was an invalid delegation of the police power of the state was obviously based on what was thought to be an improper attempt to authorize the Ohio River Valley Water Sanitation Commission to:

- (a) Require a minimum treatment of sewage and industrial wastes discharged into water of the Ohio drainage basin, and

- (b) Issue orders to citizens of the signatory states to compel abatement of any discharge of sewage or industrial waste in violation of the compact. Such authority is given to the Commission in Article VI and IX of the Compact.

However, it is provided in Article IX of the Compact that no such order shall be effective against any corporation, person or entity within a state unless and until it receives the assent of not less than a majority of the Commissioners of such state.

Under the provisions of Section 2 of House Bill No. 369, passed March 11, 1939, the legislative act by which West Virginia ratified this Compact, two of the Commissioners representing that state are to be appointed by the Governor with the advice and consent of the Senate; and the third is to be the state commissioner of health, by virtue of his office.

Accordingly, control of the power of the Ohio River Valley Water Sanitation Commission to issue orders affecting West Virginia citizens is vested in administrative officials of that state quite as fully as though that state, acting alone, had created a commission to carry out the purposes for which the Compact was made.

Nor is it improper, under West Virginia law, for the legislature to create such an administrative board or commission and to clothe it with rule-making power, provided the legislature prescribes the policy and aims of the project concerned and establishes standards for guidance of the administrative body. This conclusion is clearly supported by the views of the minority of the West Virginia

court as expressed in the dissenting opinion filed below in this case. In *State v. Bunner* (1943), 126 W. Va. 280, 27 S. E. (2nd), p. 823, the Supreme Court of Appeals of West Virginia said:

"A statute requiring the public health council to adopt regulations to provide clean and safe milk and fresh milk products, and providing that the violation of regulations of the council which are reasonable and not inconsistent with law shall be a misdemeanor, is not unconstitutional as an improper delegation of legislative authority."

To the same effect is the rule stated in *Rinchart v. Flying Service* (1940), 122 W. Va. 392, 9 S. E. (2d) 521.

While perhaps a good case could be made for the proposition that the exercise by a state of its inherent right of compact with other states of the Union must normally be expected to involve the surrender of some degree of sovereignty for the common good, just as the nation surrenders some degree of sovereignty in concluding a treaty with a foreign state, it is not necessary in the case at bar to pursue this line of reasoning. In this case the language of the Compact clearly evinces a deliberate and studied attempt on the part of its framers to avoid the least encroachment on the sovereignty of the signatory states. Indeed, there may be some question whether it has not leaned too far in this direction to permit effective attainment of its objectives. Certainly it should not be struck down by the courts for encroachment on state sovereignty when that sovereignty is so clearly acknowledged and guaranteed by the terms of the Compact itself.

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari in this cause should be granted.

Respectfully submitted,

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No. 147

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE STATE OF WEST VIRGINIA, AT THE RELATION OF
Dr. N. H. DYER, ET AL., ETC., PETITIONERS

v.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST
VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF THE STATE OF
WEST VIRGINIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS
CURIAE IN SUPPORT OF THE PETITION

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WEST VIRGINIA*

**MEMORANDUM FOR THE UNITED STATES AS AMICUS
CURIAE IN SUPPORT OF THE PETITION**

This case involves the power of the State of West Virginia and other States in the Ohio River Basin to enter, with the consent of Congress, into the Ohio River Valley Water Sanitation Compact. 54 Stat. 752. The Compact establishes a commission, composed of representatives of all these States and financed by contributions from the States, with power to take action for controlling and abating

pollution of the waters of the Ohio River and its tributaries. Determination of the basic issue of West Virginia's power and capacity to participate in these activities is of great importance to the control of pollution, not only of the Ohio River and its tributaries, but of interstate waters generally. It also affects the power of all States of the United States to take cooperative action to attack common problems in all fields through joint use by the States of their police power. Because of the importance of the issues presented, and because we believe that the Supreme Court of Appeals of West Virginia has decided Federal questions of substance not heretofore determined by this Court, we believe that granting of the petition for certiorari in this case would be in the public interest.

STATEMENT

The pertinent facts in the case are not in dispute and are fully set forth in the petition for certiorari and supporting brief filed in this court by the State of West Virginia.

INTEREST OF THE UNITED STATES

The Federal Government is directly interested in the full and proper functioning of the Ohio River Valley Water Sanitation Commission, on which it is represented by three nonvoting members under the terms of the Compact. These Federal members are appointed by the President, and represent, respectively, the Public Health Service in the Federal Security Agency, the Corps of

Engineers of the United States Army, and the Fish and Wildlife Service in the Department of the Interior.

The Government's interest, however, is not confined to the fact that it participates as a member in the work of the Ohio River Valley Water Sanitation Commission. As will be set forth in more detail below, the issues raised by the decision below are of fundamental importance in the entire field of water pollution control. This field is one of Federal concern. The passage of the Water Pollution Control Act, 62 Stat. 1155 (Public Law 845, 80th Congress; 2d Sess., approved June 30, 1948) established a broad program of cooperative activity between Federal and State governments and interstate agencies for eliminating or reducing pollution and improving the sanitary condition of waters. At the Federal level, the Act is administered by the Surgeon General of the Public Health Service. While the Federal Government contributes financial and technical assistance and is developing an over-all comprehensive program of water pollution control, the Act recognizes the primary rights and responsibilities of the States in dealing with the problem. The Federal Government, therefore, clearly has a legitimate interest in preserving the effectiveness of any agency through which the States are furthering the program which the Government is fostering under the Water Pollution Control Act. And since Section

2 (b) of the Act specifically directs the Surgeon General to—

encourage cooperative activities by the States for the prevention and abatement of water pollution; encourage the enactment of uniform State laws relating to water pollution; *encourage compacts between States for the prevention and abatement of water pollution; . . .*
[Italics supplied.]

it is plain that the Congress has indicated a direct concern in preserving the effectiveness of just such agencies as the Ohio River Valley Water Sanitation Commission.

In the administration of the Water Pollution Control Act, moreover, the Surgeon General has maintained a close cooperative relationship with the Commission and has made grants under Section 8 (a) of the Act to the Commission and other interstate agencies for the conduct of studies relating to water pollution caused by industrial wastes.

Finally, the Federal Government has a general interest in the preservation of interstate compacts, particularly those relating to interstate waters. In furtherance of this interest, the Government has filed supporting memoranda in this Court in previous litigation concerned with an interstate compact on water apportionment. *E. g., Hinderlider v. LaPlata Co.*, 304 U. S. 92. As was pointed out in one of these memoranda (Memorandum on Behalf of the United States, No. 437, October Term, 1937, p. 5)—

The Federal Government, of course, is anxious that the States have the power expeditiously and effectively to arrange and to adjust the difficulties which must arise because of the territorial division of political jurisdiction within a single economic society. This interest is attested by the power given to Congress by the Constitution to approve or disapprove the compacts of the States.

DISCUSSION

1. *Effect of the decision below on the operation of the Ohio River Compact.* Even if the position of the West Virginia Supreme Court is not adopted by any other State, the decision below would have a crippling effect on the operation of the Ohio River Valley Water Sanitation Compact. As is apparent from a glance at the map of the Ohio River Basin, West Virginia is an upstream State. The main stem of the Ohio River forms its northern boundary over several hundred miles, and within its territory are found a number of the principal tributaries, including the Monongahela, the Kanawha, the Little Kanawha, the Guyandot, and the Big Sandy. Ten per cent of the population of the Basin lives in West Virginia and at least ten per cent of the industrial wastes discharged into the Ohio River and its tributaries are discharged in West Virginia. In the important fields of acid drainage from coal mines and wastes from manufacturing chemical establishments, the contribution of West Virginia

is in an even higher proportion.¹ It can readily be seen, therefore, that inability to control discharges of pollution from municipalities and industrial concerns in West Virginia will cast an extremely heavy burden on the efforts of the other States to maintain the purity of the river. This is particularly true of Ohio, Kentucky, and Indiana, which are located downstream from West Virginia on the main stem of the river. In addition, the acid drainage from the coal mines of West Virginia into the Monongahela River results in a serious problem for the State of Pennsylvania.

2. Bearing of the decision below on the general effectiveness of interstate compacts, particularly in the field of water pollution control.

(a) Perhaps the most serious aspect of this case is that the decision of the West Virginia Supreme court, if it were followed, would deal a severe blow to the States' power to enter into compacts for co-operative action to meet common problems. Under the majority opinion below, any compact establishing an interstate agency would be invalid if it provided either for future contribution by the States to meet the expenses of the agency or for exercise of any police power by the agency. On the latter point, the court's decision is sweeping. It does not merely impose a limitation on the extent to

¹ These statistics are taken from the Report of the Ohio River Committee (House Document No. 266, 78th Congress, 1st Session) pages 8-24.

which regulatory power may be delegated to such an agency but prohibits entrusting it with any powers of enforcement.

The reasoning of the opinion is applicable to the constitutions of most States as well as to West Virginia. Debt limitations comparable to Article X, Section 4 of the West Virginia Constitution are common. As to the police power, the Court referred to no specific provisions in the organic law of the State, but based its holding on general principles of constitutional law. Presumably, the same reasoning would be equally valid as to the constitution of any other State in the Union.

Either of these objections would be fatal to a high proportion of the interstate compacts which are being adopted in constantly increasing numbers every year. Of the 31 interstate compacts ratified by the Congress from 1934 to 1949, over half established interstate agencies with provision for financial contribution by participating States. See Council of State Governments, *Book of the States, 1950-1951*, pp. 26-31. In a substantial number of these and other compacts, moreover, enforcement powers have been vested in an interstate agency or concurrent penal jurisdiction has been provided for two or more States. Thus, under these compacts, participating States have agreed to exercise of police power on matters within their jurisdiction by interstate agencies or other States in the fields of water pollution control, supervision of parolees and probationers, police control over navigable waters,

and other subjects. All these compacts would presumably be void under the principles declared in the West Virginia court's opinion, and certainly the decision below will bar the State of West Virginia from entering into most types of interstate compacts. An authoritative determination of this Court would be most helpful in resolving the fundamental questions raised by the Supreme Court as to the States' ability to enter into compacts and the validity of many existing compacts.

(b) The necessity for cooperation among the States in the field of control and abatement of water pollution is particularly urgent. The waters of the streams and lakes of this country are essentially interstate in character and interstate action is required to preserve their purity. Our great rivers almost without exception flow across or along the boundaries of several States, and the lesser streams are tributaries to these interstate rivers. Discharge of pollution into any stream, therefore, necessarily has its effect on the quality of the waters flowing through other States. It follows that the downstream States cannot maintain the purity of their waters unless discharges of municipalities and industrial establishments in the upstream States are controlled. Inherent in the nature of the problem is the fact that such controls must be exercised at the point of discharge. Once the polluting material has been discharged into the stream it is too late for any treatment to correct its harmful effect.

It is true that States and their citizens have a remedy in the courts to protect themselves against pollution of the waters which they use. Action may be instituted in an appropriate forum to enjoin excessive discharges of waste, where actual damage can be shown. Resort to this remedy, however, necessitates long drawn-out litigation which in the end may afford no conclusive solution to the problem. To avoid this difficulty, the States should be free to solve the problem through agreement and compact, and if necessary to establish administrative agencies to insure continuity of administrative control over the affected region.

These principles have been recognized by this Court. In *New York v. New Jersey*, 256 U. S. 296, after passing on the merits of a complicated and difficult controversy between the two States arising out of disposal of sewage in New York Bay, the Court, speaking through Mr. Justice Clarke, made the following comment (256 U. S. at 313):

We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court, however constituted.

See also *Hinderlider v. LaPlata Co.*, 304 U. S. 92,

104-106; Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, (1925) 34 Yale Law Journal 685, 708.

Recognizing these principles, States have more and more adopted the course of entering into collective agreements for regional control of the pollution of waters in which they have an interest. An outstanding example of this tendency is, of course, the compact which is the subject of the present case. The agreements setting up the Interstate Commission on the Potomac River Basin, the New England Water Pollution Control Commission, the Tri-State Waters Commission (Minnesota, North Dakota, and South Dakota), and the Interstate Sanitation Commission (Connecticut, New Jersey, and New York), may also be cited. In addition, a number of other agreements have been entered into by various States with respect to water resources development, which are not primarily directed to pollution control but include this activity among the principal functions of the agencies established. Examples are the Interstate Commission on the Delaware River Basin and the marine fisheries commissions set up for the Atlantic, Gulf, and Pacific Coast States.

If the ruling of the Supreme Court of West Virginia is followed by other courts, the effectiveness of all these interstate agencies will, at the least, be seriously impaired, and it may be that the compacts

establishing the commissions will be entirely invalidated. Under the first of the principles on which the court relies, the States could not bind themselves to contribute to the cost of operation of the agencies. Furthermore, the restriction on the exercise of police power, as announced in the opinion below, would raise a question both as to the validity of water quality standards established under these compacts and also as to the obligation of the participating States to comply with or enforce them.

3. *Federal questions presented.* It is not our purpose to discuss in detail the legal issues involved in this case at this time. It seems manifest, however, that it involves substantial Federal questions which are properly justiciable in this Court. In the first place, the West Virginia court could not have decided the case without passing on important questions of construction of the Compact. Thus, it was necessary for that court to interpret the Compact as creating a "debt" of a signatory State; as creating an agency of other States and the Federal Government, and delegating to it the police power of West Virginia; as being irrevocable and perpetually binding on the State of West Virginia and other participating States; and as binding future legislatures to make appropriations for the expenses of the Commission. It is settled that a decision by the highest court of a State passing upon the construction of an interstate compact in-

volves a federal right, privilege, or immunity, which, when specially set up and claimed in the State court, may be reviewed by this Court under Section 1257(3) of Title 28. *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U. S. 419, 427; see *Hinderlider v. LaPlata Co.*, 304 U. S. 92, 110.

Secondly, the State court passed on the validity of the Compact which had been ratified by the State of West Virginia and approved by Congress. This also presents an issue for resolution by this Court, and in its review of the West Virginia court's decision the Court would not appear to be bound by the State court's determination even on the interpretation of the State constitution and statutes, or the internal authority of the State to enter into this Compact. *Kentucky v. Indiana*, 281 U. S. 163, 176-177; *Stearns v. Minnesota*, 179 U. S. 223; *Virginia v. West Virginia*, 220 U. S. 1.

Finally, the case may involve substantial and far-reaching questions, under the Federal constitution, as to the inherent power of States to enter into interstate compacts of this nature, and of the effect and validity of a State's attempt, in its own constitution, to disable itself from participating in such agreements.

CONCLUSION

In the Government's view, the public importance of the issues in this case are such that this Court should grant the petition for certiorari. The Court

has in the past emphasized the propriety under the Constitution, and the desirability as a matter of public policy, of agreements between States for the resolution of common problems. The decision of the West Virginia court, if allowed to stand, would cast doubt on the power of States to enter into such compacts, not only in the field of water pollution control, but in all areas in which joint exercise of their police power by States has been felt to be desirable. The issues of interpretation and validity of the compact presented in this case are federal questions which may properly be reviewed by this Court on certiorari. Indeed, the confusion and uncertainty which will necessarily follow from the decision of the West Virginia court can be resolved only by an authoritative decision of this Court.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

ARNOLD RAUM,
Acting Solicitor General.

AUGUST 1950.

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NO. 147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER, Et Al., Etc., Petitioners,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia.

**On Petition for a Writ of Certiorari to the Supreme
Court of Appeals of the State of West Virginia.**

**BRIEF FOR THE COMMONWEALTH OF
PENNSYLVANIA AS AMICUS CURIAE
IN SUPPORT OF PETITION.**

**CHARLES J. MARGIOTTI,
Attorney General.**

**HARRY F. STAMBAUGH,
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Deputy Attorney General,
Attorneys for the Commonwealth
of Pennsylvania.**

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**BRIEF FOR THE COMMONWEALTH OF
PENNSYLVANIA AS AMICUS CURIAE**

STATEMENT

The Attorney General of Pennsylvania adopts the statement in the petition of the State of West Virginia, but submits additional facts to show that Pennsylvania has a real and substantial interest in securing a ruling that the State of West Virginia is bound by the provisions of the Ohio River Valley Water Sanitation Compact.

The Monongahela River and its tributaries rise in West Virginia. The Monongahela is joined by the Cheat River at a point in Pennsylvania near the boundary between West Virginia and Pennsylvania and then flows through Pennsylvania to Pittsburgh where it meets the Allegheny River to form the Ohio River.

The total length of the Monongahela River is 128.1 miles, of which 36.5 miles are in West Virginia and 91.6

Statement.

miles in Pennsylvania. The total drainage area of the Monongahela River is 7340 square miles and of this area 4612 square miles are situated in West Virginia and 2728 square miles in Pennsylvania.

The Monongahela River provides water for public water supplies in Pennsylvania serving a total population of 465,090 persons.

Fifty municipalities in West Virginia, having a population of 500 or more, discharge wastes by sewers into the Monongahela River.

Sixty-five industrial establishments in West Virginia contribute wastes through sewers into the Monongahela. Of these industries, twelve are coal washeries contributing silt and six are industrial plants contributing wastes of a chemical nature.

Under appropriate legislation Pennsylvania is requiring the treatment of sewage and of industrial wastes, including silt from bituminous coal mines.

Article VI of the Compact expressly provides that all sewage from municipalities or other political subdivisions, public or private institutions or corporations, discharged or permitted to flow into portions of the Ohio River and its tributaries, including waters which flow from one signatory state into another signatory state, as well as all industrial wastes which are permitted to flow into such waters, shall be treated before being discharged into such waters (Petition, pp. 40-41).

Failure of West Virginia to treat sewage and industrial wastes, as provided in the Compact, will very substantially lessen the effect of the program of Pennsylvania for the purification of streams.

ARGUMENT

Federal Questions Presented.

(A) Construction of the Compact, and particularly in the following respects:

(1) Whether the adoption of the contract by the State of West Virginia amounts to a surrender or delegation of its police power, especially in view of the following provisions of the Compact.

Article IV—

“ * * * The commissioners from each State shall be chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed * * *.” (W. Va. Petition, p. 39)

Article IX—

“ * * * no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state.” (p. 43)

(2) Whether the provisions of the Compact violate the following sections of Article X of the Constitution of West Virginia.

Section 3—

“No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the Auditor; nor shall any money or fund be taken for any other

Argument.

purpose than that for which it has been or may be appropriated or provided. A complete and detailed statement of the receipts and expenditures of the public monies shall be published annually."

Section 4—

"No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

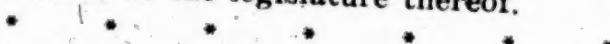
Section 6—

"The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become [fol. 32] responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever." (R. 23-24)

The pertinent provisions of the Compact are the following:

Article V—

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.



"The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof." (Petition p. 40)

Article X—

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States * * * *." (Petition p. 43)

It will be necessary for this court to interpret each of the clauses of the Compact quoted above and determine the legal effect of such clause, before the court can decide whether the Compact does conflict with the Constitution of West Virginia.

That the construction of an interstate compact presents a Federal question is no longer open to argument.

In *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U. S. 419 (1940), this court, by Mr. Justice Stone, said:

"* * * we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege, or immunity' which then 'specially set up or claimed' in a state court may be reviewed here on certiorari under § 237 (b) of the Judicial Code, 28 U.S.C. § 344, 28 U.S.C.A. § 344 (b). * * *" (427)

Argument.

(B) The validity of the compact and of the provisions quoted *supra* in questions (A), (1) and (2).

The compact is an act of the signatory states and is an act of the State of West Virginia.

In order to determine the validity of the compact it becomes necessary for this court to determine the legality of the act of West Virginia in executing such compact and to decide whether the State of West Virginia, in view of the provisions of its constitution, lacks capacity to enter into the compact.

So in deciding the question of validity of an ordinary contract, the court must pass upon the legality of the act of each party in signing the same; for example, whether a party signing is *sui juris*, or whether the execution by an agent was in excess of his authority.

Every argument in favor of holding that the construction of a Compact involves a Federal question, applies with equal cogency to a question of its validity.

That the validity of an interstate Compact presents a Federal question was ruled in *Hinderlider v. La Plata Co.*, 304 U. S. 92 (1938). In that case the Supreme Court of Colorado had held that a provision in a compact between that state and New Mexico, for apportionment of a river between the two states, was in violation of Section 25 of the Colorado Constitution, which declared that the water of a stream not previously appropriated was the property of the people of the state and the right to divert the same should never be denied, and that the compact was unconstitutional (pp. 99, 104).

This court has repeatedly held that in order to determine whether the obligation of a contract has been impaired, this court will examine the record and determine for itself whether a contract was legally made and is binding on the party. Otherwise, the constitutional guarantee could be readily evaded by a decision of a state court that no contract existed. See *Kentucky v. Indiana*, 281 U. S. 163, 176-177 (1930).

The same urgency exists in this case. If a State can escape liability under a contract by a ruling of its courts that its execution was *ultra vires*, the exercise of the power of Congress under the Compact clause of the Federal Constitution will be thwarted and nullified.

(C) Whether after a state has assumed obligations by entering into an interstate compact and Congress has approved such contract, the state may disable itself, by decision of its highest court or by act of any other governmental agency, from performing such obligations.

Prior to the adoption of the Federal Constitution every state, as part of its sovereignty, had inherent power to enter into compacts with other states:

Poole v. Fleeger, 11 Peters 185, 209 (1837);

Rhode Island v. Massachusetts, 12 Peters 657, 725 (1830).

The Compact Clause of the Constitution necessarily recognized and affirmed the existence of this power in the states:

Poole v. Fleeger, 11 Peters 185, 209 (1837);

Virginia v. West Virginia, 246 U. S. 565, 601, 602 (1918).

Argument.

It is submitted that a state may not, by adopting a Constitution, or by decision of its highest court interpreting such Constitution, disable itself from participating in an interstate compact or performing its obligations thereunder.

In *Virginia v. West Virginia, supra*, the State of West Virginia had been created out of the State of Virginia and had been admitted to the Union by an enabling Act of Congress which expressly made it a condition of such admission that West Virginia pay a proportionate part of the indebtedness of the State of Virginia as provided in a compact between the two states.

The State of West Virginia failed to pay such sum. Its Legislature failed to levy taxes to provide a fund for such payment, and the State of Virginia filed an original suit in this court to compel performance of the compact by the State of West Virginia.

West Virginia set up in defense that it could not be controlled by judicial process or be compelled to levy a tax to create a fund to pay a judgment in favor of Virginia.

This court sustained the compact and the power of this court to enforce the same.

In the opinion, Chief Justice White said:

"The State, then, as a governmental entity, having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain, even although their

exertion may operate upon the governmental powers of the State * * * (600)

"The vesting in Congress of complete power to control agreements between States, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, *to see to its enforcement.* * * * (601)

"Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete, limited of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This being true, it further follows, as we have already seen, that, by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States.

Argument.

Indeed, the argument that the recognition of such a power in Congress is subversive of our constitutional institutions from its mere statement proves to the contrary, since at last it comes to insisting that any one State may, by violating its obligations under the Constitution, take away the rights of another and thus destroy constitutional government. * * * (Italics supplied) (602)

An analogy is furnished by the decisions of this court in which it has been frequently held that a condition in an enabling Act of Congress which would deny a new state any of the powers possessed by other states, is unconstitutional.

Thus in *Coyle v. Oklahoma*, 221 U. S. 559 (1911), the enabling act for the admission of the new State of Oklahoma required that its capital be located in a named city.

In holding this condition unconstitutional, this court, by Mr. Justice Lurton, said:

"This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission.

* * * (557)

"The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission. (573)

* * * * *

"To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." (580)

The opinion also quoted (p. 575) the following language of Mr. Justice Field in *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882):

* * * * *

Equality of constitutional right and power is the condition of all the States of the Union, old and new. * * * * " (689)

This decision holds that the people did not intend that Congress should have the power, or be permitted, to impose a disability upon a state before its admission, or as a condition precedent to its admission. With equal cogency it may be reasoned that the people did not intend that after a state had been admitted, some authority thereof—the Legislature or the Supreme Court, or even the people of the state, by constitutional amendment—should be allowed to disable the state from exercising an inherent power which all states possessed,



Argument.

or from performing an obligation which the state had assumed or to impose any restriction on the power of the state to do so.

A new state upon admission is as fully sovereign and has the same powers as the thirteen original states or any other state. Congress may not impose any limitation upon the sovereignty of the new state, by disability or otherwise. The same reasoning applies to any self-imposed limitation or disability. There will be an even greater temptation to the people of the state to take some short-sighted action believed to further its selfish interests, than to Congress which is made up of representatives of every state and is less inclined to favor a local interest.

A state whose constitution is weakened by restrictions or disabilities is just as unfit for membership in the Union whether the same are imposed by an Act of Congress or by a clause of the State Constitution.

The restriction held invalid in *Coyle v. Oklahoma*, *supra*, affected only the internal management of that state. The restriction imposed by the Constitution or a judicial decision in West Virginia would hinder, if not wholly defeat, the purpose and performance of a compact in which other states are interested.

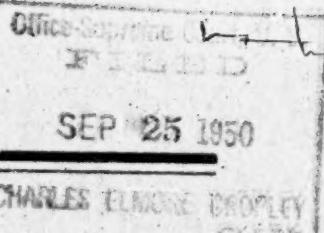
Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 147

**THE STATE OF WEST VIRGINIA, AT THE RELATION OF
DR. N. H. DYER, ET AL., ETC., Petitioners,**

v.

**EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST
VIRGINIA, Respondent.**

*On Petition for a Writ of Certiorari to the Supreme Court of Appeals of the
State of West Virginia.*

**BRIEF OF THE INTERSTATE COMMISSION ON THE POTOMAC
RIVER BASIN AS AMICUS CURIAE IN SUPPORT OF PETI-
TION FOR CERTIORARI**

OLIVER GASCH

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Of Counsel

**L. HAROLD SOTHORON,
ROBERT J. HAWKINS,
Washington, D. C.**

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v.

**EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST
VIRGINIA, Respondent.**

*On Petition for a Writ of Certiorari to the Supreme Court of Appeals of the
State of West Virginia*

**MEMORANDUM OF THE INTERSTATE COMMISSION
ON THE POTOMAC RIVER BASIN AS AMICUS
CURIAE IN SUPPORT OF THE PETITION**

This brief is filed on behalf of the Interstate Commission on the Potomac River Basin composed of three members from each of the signatory states, i. e., Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia. The United States is represented by three voting members appointed by The President.

**INTEREST OF THE INTERSTATE COMMISSION
ON THE POTOMAC RIVER BASIN**

The interest of the Interstate Commission on the Potomac River Basin in this litigation is both direct and general.

It is direct for the reason that respondent Sims has concluded that the decision of the court below constitutes a mandate requiring him to refuse to honor a requisition on him for the payment of West Virginia's share in the expenses of the Potomac Commission. Refusal by respondent Sims to pay funds duly appropriated by the Legislature of West Virginia for the use of the Potomac Commission has thus jeopardized the full and proper functioning of the Potomac Commission.

In a broader sense, the members of the Potomac Commission are convinced that the philosophy of cooperative, voluntary state activity by the compact method directed toward the abatement of pollution in the stream basins of the nation is a vital conservation measure. It is sanctioned by the Constitution of the United States, authorized and approved by the Federal Congress, and specifically approved by the legislatures of the member states both in the Ohio Basin and in the Potomac Basin. If the decision below is allowed to stand, the entire structure of interstate agreements will be placed in jeopardy.

STATEMENT OF THE CASE

The petition for a writ of certiorari, which has been filed in this case by the State of West Virginia, contains a full statement of the facts involved and the proceedings in the court below. The petition, the brief of the States of Ohio, Indiana, Illinois, Kentucky, Pennsylvania, and New York as amici curiae, in support of the petition for writ of certiorari, and the memorandum for the United States as amicus curiae in support of the petition, contain a full and detailed statement of the public interest in compacts of the nature of the one herein in question, which statements apply equally to the Potomac Basin compact. No useful purpose could be served in repeating or restating the facts and able arguments therein presented. It is desired, however, to adopt the facts and endorse the arguments therein set forth

and, with as little repetition as possible, to supplement them with a few points, set out below, which we believe may be of assistance to this Court.

DISCUSSION

Introduction

The great public interest in and practical necessity for interstate compacts such as the one here in question, having already been fully covered in the briefs above referred to and conceded even by the respondent, the Court's attention is invited to the following facts and circumstances.

Respondent Sims, in his brief, seeks to establish that there is involved only the simple issue of the interpretation of a state statute by the highest court of that State. If this were all that is involved, there would clearly be no question for this Court to entertain.

However, the patent fact is that there is involved in the instant controversy the analysis and interpretation of an interstate compact which together with its enabling legislation constitutes not only an Act of the Legislature of West Virginia but which is also an Act of the Congress of the United States and the other states signatory to the Ohio compact. We will not repeat the argument clearly set forth in petitioner's brief and in the supporting briefs filed by the Attorneys General of the interested States and on behalf of the United States. These arguments respecting the interstate compact phase of this case clearly establish a jurisdictional basis for review by this Court.

Kentucky v. Indiana, 281 U. S. 163, 176-177

Searns v. Minnesota, 179 U. S. 223

Virginia v. West Virginia, 220 U. S. 1

Delaware River Joint Toll Bridge Commission v. Colburn, 310 U. S. 419

Hinderlider v. LaPlata River and Cherry Creek Ditch Co., 304 U. S. 92.

The Issues to be Discussed

I. APPROPRIATIONS IN PERPETUITY.

Does membership in the Ohio Commission compact bind future West Virginia legislatures?

II. POLICE POWER.

Does membership in the Ohio Commission compact constitute a delegation or surrender of West Virginia's police power to the Ohio Commission?

III. CONSTITUTIONALITY.

Should a determination of unconstitutionality have been made on a hypothetical situation?

I.

APPROPRIATIONS IN PERPETUITY

Does membership in the Ohio Commission compact bind future West Virginia legislatures?

We would like to emphasize and refer to the pertinent provision of the Constitution of the State of West Virginia.

"Limitation on Contracting of State Debt.
 (Article X) 4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

It is upon this provision that respondent relies. We believe it can clearly be demonstrated that there is no conflict between this constitutional provision and the provisions of the Ohio compact. Reference to the specific safeguards of the Ohio compact illustrates that the framers of the compact

were aware of the necessity for recognizing the implications of this provision.

Article V of the Ohio compact reads as follows:

"The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof." (Emphasis supplied.)

Article VII of the compact specifically reserves to the states signatory all power and authority possessed by them prior to the enactment of the legislation authorizing the compact. The applicable phrase of this section is as follows:

*"Nothing in this Compact shall be construed to limit the powers of any signatory state ***."*

Article X of the compact is the section alleged to be in conflict with the Constitution of West Virginia. In pertinent part, it reads as follows:

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States, one-half of such amount to be prorated among the several States in proportion of their population within the District at the last preceding federal census, the other half to be prorated to their land area within the District."

The enabling act of the State of West Virginia (see page 45, Petitioner's brief, Appendix C) employed the following language with respect to the appropriation of its portion of the necessary funds to support the Commission:

"There shall be appropriated to the Commission out of any moneys in the State treasury unex-

pended and *available therefor*, and not otherwise appropriated, such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportions of the State of West Virginia of the annual budget of the Ohio River Valley Water Sanitation Commission *in accordance with article ten of said compact.*

The commission shall elect from its membership a chairman and may also select a secretary who need not be a member. The commission may employ such assistance as it *may* deem necessarily required, and the duties of such assistants shall be prescribed and their compensation fixed by the commission and paid out of the state treasury out of funds appropriated for such purposes upon the requisition of said commission."

The above provisions make the intent of the signatory states, including West Virginia, with respect to the obligation of each state, abundantly and patently clear. Article X of the compact is necessarily limited by the prior provisions of Article V. The Commission may incur no obligation of any kind prior to the making of appropriations adequate to meet the same. The Commission must of practical necessity depend upon the appropriations of the signatory states for its existence. If it may not incur any obligation prior to the passage of adequate appropriations to meet them, it must await the endorsement of each successive legislature before proceeding beyond the limits of the last.

When these provisions are read together, it is clear that there is no conflict between the compact, the West Virginia enabling legislation, and Article X of West Virginia's Constitution. Article V and Article VII of the compact clearly prevent the Ohio Commission from in any way either pledging a credit of West Virginia or creating any debt for which West Virginia would be obligated prior to the time the Legislature of West Virginia appropriates funds for the obligation in question.

II

POLICE POWER

Does membership in the Ohio Commission compact constitute a delegation or surrender of West Virginia's police power to the Ohio Commission?

The second objection of the court below to the compact in question was that it delegated police power of the state to the Ohio Commission. Here again reference to the specific revisions of the compact demonstrates clearly the fallacy of this conclusion. Article IX of the compact in pertinent part reads as follows:

" * * * The Commission shall give reasonable notice of the time and place of the hearing to the municipality, corporation or other entity against which such order is proposed. *No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state.*" (Emphasis supplied.)

West Virginia is represented on the Ohio Commission by its State Health Officer, Dr. Dyer, and two other commissioners who are appointees of the Governor of the State. With respect to any proposed order of the Ohio Commission for the abatement of any pollution condition within the territorial jurisdiction of West Virginia, these three West Virginia officials have complete jurisdiction and control. How this article could be considered a delegation of West Virginia's authority to act is certainly not shown by the majority opinion of the court below. As in the case of the sections of the compact relating to appropriation, it is believed that the compact itself when fairly analyzed and interpreted contains adequate safeguards to protect the

authority and sovereignty of each of the states signatory to the compact.

III

CONSTITUTIONALITY

Should a determination of unconstitutionality have been made on a hypothetical situation?

The specific situation with which the Court is confronted is the refusal of respondent, the State Auditor, to pay state funds previously appropriated by the Legislature of West Virginia to Dr. Dyer, the State Health Officer, for the use of the Ohio Commission. We think it is important to note that the action of the respondent must be regarded as contrary to the advice of the Attorney General of West Virginia who appeared in the court below as counsel for Dr. Dyer and the other West Virginia members of the Ohio Commission. It is also important to observe that the Attorney General of West Virginia appears in this Court as counsel for the petitioner. The duties of the State Auditor, under the circumstances, are clearly ministerial and not discretionary.

Under the circumstances, it is unnecessary to determine what the situation would be if the Legislature of West Virginia failed or refused to appropriate West Virginia's share of the expenses under the compact. That question is purely hypothetical and is neither before the court below nor is it properly an issue before this Court.

The majority of the court below determined that a binding obligation on future state legislatures was created by reason of the fact that a suit might be brought against the State of West Virginia if the Legislature of that State refused to appropriate funds or sought to withdraw from the compact. It was on this hypothetical situation that the constitutionality of the compact and the state enabling legislation was determined. It is clearly established by the decisions of this Court that constitutionality of legislation

should not be determined abstractly or in a hypothetical case. This Court applies the familiar canon of interpretation that where two interpretations of a statute are possible—one which saves and the other which destroys, the interpretation which saves the constitutionality will be adopted. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 355, 57 S. Ct. 816, 824.

In the final analysis, we believe that the decision below was erroneous in that it was unnecessary for the court below to pass on the constitutionality of the compact. Its decision in so doing was based on a hypothetical set of facts not presented in this record. Its decision went far beyond its prerogatives in passing on the constitutionality of an interstate compact. This Court is the final arbiter of the validity or invalidity of interstate compacts. *Kentucky v. Indiana*, *supra*.

CONCLUSION

It is respectfully submitted that this Court should assume jurisdiction, and, after analyzing and weighing the provisions of this interstate compact, reverse the erroneous decision of the court below and thus remove the cloud created by the decision below on all interstate compacts.

Respectfully submitted,

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No. 147

In the Supreme Court of the United States

OCTOBER TERM, 1950

**THE STATE OF WEST VIRGINIA, AT THE RELATION
OF DR. N. H. DYER, ET AL., ETC., PETITIONERS**

v.

**EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST
VIRGINIA**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
APPEALS OF THE STATE OF WEST VIRGINIA**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The majority opinion of the West Virginia Supreme Court of Appeals (R. 14) is reported at 58 S. E. 2d 766. The dissenting opinion (R. 32) is reported at 58 S. E. 2d at 777.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered April 4, 1950 (R. 13-14). The petition for a writ of certiorari was filed June 26, 1950, and was granted October

9, 1950. The jurisdiction of the Court rests on 28 U. S. C. 1257 (3). See *infra*, pp. 17-22.

QUESTIONS PRESENTED

1. Whether the Ohio River Valley Water Sanitation Compact binds the signatory States in perpetuity or whether a State may withdraw by unilateral legislative action.
2. Whether, in adhering to the Compact, the Legislature of West Virginia exceeded its constitutional authority by creating a debt of the State in violation of Article X, Section 4, of the State constitution.
3. Whether, in adhering to the Compact, the Legislature exceeded its constitutional authority by invalidly delegating authority to the Ohio River Valley Water Sanitation Commission established by the Compact.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Section 10, Clause 3 of the Constitution of the United States provides:

No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State * * *.

2. Article X, Section 4, of the Constitution of West Virginia provides:

Limitation on Contracting of State Debt

4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of

the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

3. Public Resolution No. 104, 74th Congress, approved June 8, 1936, 49 Stat. 1490, authorized the States of the Ohio River drainage basin to enter into an interstate compact for the control and abatement of stream pollution in that basin. The full text of the resolution is set forth in an Appendix to petitioners' brief.

4. Public Law 739, 76th Congress, approved July 11, 1940, 54 Stat. 752, expressly gave the consent and approval of Congress to the Ohio River Valley Water Sanitation Compact in the form in which it was ratified and enacted into law by all participating States. The full text of that Act, including the full text of the Compact, appears in an Appendix to petitioners' brief.

5. Chapter 38 of the Acts of the West Virginia Legislature, Regular Session, 1939, ratified and enacted into law the Ohio River Valley Water Sanitation Compact. The full text of that Act, excluding the text of the Compact (which is identical with the text set out in Public Law 739, 76th Congress, 54 Stat. 752) appears in an Appendix to petitioners' brief.

STATEMENT

This case originated in a mandamus proceeding instituted in the Supreme Court of Appeals of West Virginia by the State of West Virginia upon the relation of the Commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission, and the chairman and members of the West Virginia State Water Commission (R. 1, 5). The suit was brought to compel the respondent, Edgar B. Sims, the duly elected and qualified Auditor of the State of West Virginia, to honor a requisition for the issuance of a warrant upon the treasury of the State for the payment of an appropriation previously made by the West Virginia Legislature of the sum representing that State's proportionate share of the expenses of the Ohio Valley Water Sanitation Commission for the fiscal year 1949-1950. The facts are not in dispute, and for the most part appear on the face of the pleadings.

1. The Ohio River Valley Water Sanitation Compact is an interstate compact for the control and abatement of stream pollution in the Ohio River drainage basin. It has been ratified and approved by the legislatures of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia. Ratification and approval of the Compact was accomplished by the State of West Virginia on March 11, 1939, through the enactment of Chapter 38, Acts of

the West Virginia Legislature, Regular Session, 1939. The consent and approval of Congress was expressly given to the Compact by Public Law 739, c. 581, 76th Congress, 54 Stat. 752, approved July 11, 1940 (R. 1-2).

In evidence of their ratification, adoption, and enactment into law of the Compact, that document was formally executed on behalf of each of the above-named eight States by their respective Governors and other appropriate representatives at Cincinnati, Ohio, June 30, 1948 (R. 2). Following this formal execution, the Ohio River Valley Water Sanitation Commission, which was created by the terms and provisions of the Compact, was organized and launched upon a program designed to fulfill the objectives of the Compact. The Commission consists of three Commissioners from each of the signatory States and three non-voting Commissioners representing the United States Government. These Commissioners were duly designated by the United States and the signatory States, including West Virginia, and the Commission has been functioning for some two years.

The Commission is charged with general responsibility for carrying out the provisions of the Compact. More specifically, it has authority to establish standards of water quality for the waters of the Ohio River Drainage Basin, and to issue orders against municipalities, corporations,

persons or other entities discharging wastes into such water. No such order shall be effective unless it receives the assent of at least the majority of the Commissioners from each of not less than the majority of the signatory States, including a majority of the Commissioners from the State where the person against whom the order is directed is located. In addition, the Commission has responsibility for carrying out other functions related to the purposes of the Compact, such as investigation, research, and recommendation of uniform legislation. Provision is made for appropriation by each of the signatory States of their proper proportion of the annual budget as determined by the Commission and approved by the Governors of such States, one-half of such amount to be prorated among the several States in proportion to their population and the other half in proportion to their land area within the district. Amounts so appropriated are to be applied to salaries, office, and other administrative expenses of the Commission.

2. The West Virginia Legislature at its 1949 session appropriated \$12,250, as the State's contribution to the expenses of the Commission for each of the two fiscal years beginning July 1, 1949, and July 1, 1950 (R. 2). West Virginia Acts (1949), c. 9, item 93. These appropriations represented West Virginia's proportionate share, computed in accordance with the provisions of

the Compact, of the expenses of the Commission for these two fiscal years.

Respondent, Edgar B. Sims, as Auditor of the State of West Virginia, is required to issue warrants upon the Treasury of that State before appropriations of its legislature may be paid (R. 2). On August 26, 1949, Dr. N. H. Dyer, a petitioner here and one of the relators in the proceeding below, acting in his capacity as a duly appointed and qualified commissioner representing the State of West Virginia under the Ohio River Valley Water Sanitation Compact, submitted to respondent, as State Auditor, a requisition for the issuance of a warrant authorizing payment to the Ohio River Valley Water Sanitation Commission of the above-mentioned sum appropriated by the Legislature of West Virginia (R. 3).

Respondent refused to honor this requisition, and again refused to honor such a requisition when, on two subsequent occasions, November 7, 1949, and December 22, 1949, it was resubmitted to him (R. 3).

3. The present proceedings were thereupon instituted by petitioners in the Supreme Court of Appeals of West Virginia, the highest court of the State, seeking a writ of mandamus commanding respondent to issue the requested warrant (R. 1, 5). Upon petitioners' application, the Supreme Court of Appeals issued a rule commanding respondent to appear and show cause

why the relief sought by petitioners against him should not be granted (R. 5). Upon the date set for the return of the rule, respondent appeared and filed a demurrer (R. 6-7) to petitioners' application for a writ of mandamus, and, in addition, filed an answer (R. 7-9) raising no issues of fact, but which set forth various grounds upon which respondent based his refusal to honor the requisition.

Since no issues of fact had been raised, the cause was submitted to the Supreme Court of Appeals of West Virginia upon the pleadings and upon arguments and briefs of counsel (R. 12-13). By order entered April 4, 1950 (R. 13), and for reasons set forth in the opinion filed on behalf of the majority of its members (R. 14 *et seq.*), the court denied the requested writ of mandamus and dismissed petitioners' application. The court held that ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the West Virginia Legislature was an unconstitutional legislative act because it created a "debt" of the State in violation of Article X, Section 4, of the Constitution of West Virginia, and also because it delegated police power of the State (i) in perpetuity and (ii) to an agency of other States or the Federal Government or a combination of the two. Since, in the opinion of the court, the Compact was invalid, it held that the appropriation by the Legislature of West

Virginia of funds to cover the State's proportionate share of the expense of operating the Ohio River Valley Water Sanitation Commission was improper, and that therefore the respondent, as Auditor of the State, was justified in refusing to honor the requisition which had been submitted to him for the issuance of a warrant authorizing payment from the State Treasury of the sum thus appropriated.

Two of the five members of the court dissented (R. 32) on the ground that the Compact did not bind future legislatures with respect either to exercise of the police power or the making of appropriations; that it provided for exercise of police power within West Virginia only through agents of that State; that it did not create a "debt" within the meaning of the constitution of the State; and that the constitutional questions were prematurely decided since the case did not involve exercise of the police power or any effort to force future appropriations.

INTEREST OF THE UNITED STATES

The Federal Government is directly interested in the full and proper functioning of the Ohio River Valley Water Sanitation Commission, on which it is represented by three nonvoting members under the terms of the Compact. These Federal members are appointed by the President, and represent, respectively, the Public Health Service in the Federal Security Agency, the Corps of

Engineers of the United States Army, and the Fish and Wildlife Service in the Department of the Interior.

The Government's interest, however, is not confined to the fact that it participates as a member in the work of the Ohio River Valley Water Sanitation Commission. The issues raised by the decision below are of fundamental importance in the entire field of water pollution control, and this field is one of direct Federal concern. The passage of the Water Pollution Control Act, 62 Stat. 1155 (Public Law 845, 80th Congress, 2d Sess., approved June 30, 1948) established a broad program of cooperative activity between Federal and State governments and interstate agencies for eliminating or reducing pollution and improving the sanitary condition of waters. At the Federal level, the Act is administered by the Surgeon General of the Public Health Service. While the Federal Government contributes financial and technical assistance and is developing an over-all comprehensive program of water pollution control, the Act recognizes the primary rights and responsibilities of the States in dealing with the problem. The Federal Government, therefore, clearly has a legitimate interest in preserving the effectiveness of any agency through which the States are furthering the program which the Government is fostering under the Water Pollution

Control Act. And since Section 2 (b) of the Act specifically directs the Surgeon General to—

encourage cooperative activities by the States for the prevention and abatement of water pollution; encourage the enactment of uniform State laws relating to water pollution; *encourage compacts between States for the prevention and abatement of water pollution;* * * * [Italics supplied.]

it is plain that the Congress has indicated a direct concern in preserving the effectiveness of just such agencies as the Ohio River Valley Water Sanitation Commission.

In the administration of the Water Pollution Control Act, moreover, the Surgeon General has maintained a close cooperative relationship with the Commission and has made grants under Section 8 (a) of the Act to the Commission and to other interstate agencies for the conduct of studies relating to water pollution caused by industrial wastes.

Finally, the Federal Government has a general interest in the preservation of interstate compacts, particularly those relating to interstate waters. In furtherance of this interest, the Government has filed supporting memoranda in this Court in previous litigation concerned with an interstate compact on water apportionment. *E. g., Hinderlider v. LaPlata Co.*, 304 U. S. 92. As was pointed out in one of these memoranda

(Memorandum on Behalf of the United States,
No. 437, October Term, 1937, p. 5)—

The Federal Government, of course, is anxious that the States have the power expeditiously and effectively to arrange and to adjust the difficulties which must arise because of the territorial division of political jurisdiction within a single economic society. This interest is attested by the power given to Congress by the Constitution to approve or disapprove the compacts of the States.

SUMMARY OF ARGUMENT

I

This case involves questions of interpretation of an interstate compact approved by the Congress and the inherent powers of States to enter into such an interstate compact under the Constitution of the United States. These are issues which are properly justiciable by this Court. *Delaware River Joint Toll Bridge Comm. v. Colburn*, 310 U. S. 419, 427. Furthermore, since a controversy with respect to the meaning and validity of a contract between States is involved, the Court can decide all issues necessary to complete determination of the case, although local legislation and questions of State authorization may be involved. *Kentucky v. Indiana*, 281 U. S. 163, 176-177.

II

The West Virginia Supreme Court of Appeals erred in interpreting the Ohio River Valley Water Sanitation Compact as binding the signatory States in perpetuity. While the Compact is silent as to termination, its revocable nature is necessarily implied from its terms and essential nature. Furthermore, such an interpretation should be adopted in order to avoid raising the constitutional questions which were the basis of the decision by the West Virginia Supreme Court.

III

Under the foregoing interpretation of the Compact, West Virginia's adherence to the Compact clearly did not contravene any of the limitations imposed upon the State legislature.

A. No "debt" was created within the meaning of Article X, Section 4, of the State Constitution, which prohibits the "contracting" of a State "debt." Since future legislatures might provide for withdrawal from the Compact, and since no obligation could be created, even after ratification, without continuing participation and consent by the signatory States, ratification of the Compact did not create any presently-binding obligation in the nature of a debt.

B. There is likewise no invalid delegation of the State's police power. The Compact, being revocable by appropriate action by the legislature

of any signatory State, cannot be said to delegate any power in perpetuity. The powers conferred on the Ohio River Valley Water Sanitation Commission are not legislative in character but are administrative powers sufficient only to carry out the policy of the legislatures of the signatory States in accordance with standards laid down in the Compact. The Commission is the agent of all the States signatory to the Compact, and, as regards enforcement against any person in any State, the commissioners from that State constitute the sole agent of the State. Utilization of such an agency by a State for carrying out its police power functions is not improper or beyond its inherent constitutional power, and such utilization has repeatedly been made and been sustained by the courts. The decision of the West Virginia court to the contrary does not rest upon any specific provision of the West Virginia Constitution but upon limitations which it erroneously assumed to be inherent in the powers of any State in our constitutional system. This holding is not binding here, and should be rejected.

IV

Even if it be assumed that the Compact does not permit West Virginia to withdraw when it will, the court below erred in holding that the State could not adhere to the Compact.

A. The "debt" provision of the State Constitution is inapplicable because the Compact, and the State's ratifying Act, did not create any present obligation to pay a sum of money but, at most, made it possible that such a present obligation would arise in the future. This future obligation would vary in amount from year to year, depending on the Commission's activities, and could never arise in any year until the Commission's budget had been prepared and been approved by the Governors of all the signatory States, including West Virginia. A contingent obligation of indeterminate amount, such as this, is not a present "debt" within the meaning of the constitutional prohibition.

B. Nor is there an invalid delegation of authority. For the reasons stated above, even a grant of power to the Commission which was not revocable at will would neither violate any specific provision of the State constitution nor transgress any general principle of constitutional government.

ARGUMENT

The Supreme Court of Appeals of West Virginia has held that the Legislature of West Virginia in ratifying the Ohio River Valley Water Sanitation Compact exceeded its constitutional powers, and the Compact is therefore invalid.

insofar as West Virginia is concerned. This decision we believe to have been made in error, an error correctible here.

At the outset, we should like to emphasize that the court's holding represents a unique attack upon the Compact. Since its inception, all parties have fully complied with its terms, and there is no suggestion that any of the participating States or the United States is dissatisfied or desires to end the agreement or to repudiate it. Not one of the signatory States (including West Virginia, whose Attorney General represents petitioners here), nor the United States, challenges the Compact's validity or binding force. Cf. *Wharton v. Wise*, 153 U. S. 155, 168, 172; *Hinderlider v. La Plata Co.*, 304 U. S. 92, 109. The sole question has come from one subordinate fiscal official of West Virginia, in a strategic position to disregard the State's legislative acts and to refuse payment of monies appropriated by the Legislature, and it is his challenge which the court below has upheld. It is not the State of West Virginia, or any of the other parties to the agreement, which seeks to invalidate the Compact. This Court is fortunately in the position, we believe, to correct the lower court's erroneous acceptance of respondent's individual attack, and to uphold the views held by the parties to the Compact.

I

THIS CASE PROPERLY FALLS WITHIN THE JURISDICTION OF THIS COURT, AND THE COURT CAN DECIDE ALL ISSUES NECESSARY FOR FINAL DETERMINATION OF THE CASE.

A. 1. The decision of the Supreme Court of Appeals of West Virginia, that in ratifying the Ohio River Valley Water Sanitation Compact the legislature of that State exceeded its constitutional powers, necessarily involved an interpretation of the terms of the Compact itself. The court could not have reached its decision without interpreting the Compact as creating a "debt" of a signatory State; as creating an agency of other States and the Federal Government and delegating to it police power of West Virginia; as being irrevocable and perpetually binding on all signatory States; and as binding future legislatures to make appropriations for administrative expenses of the Ohio River Valley Water Sanitation Commission.

28 U. S. C. 1257 (3) provides for review of final judgments or decrees rendered by the highest court of a State

(3) By writ of certiorari, * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or

claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The construction of an interstate compact, sanctioned by the Congress under Article I, Section 10, Clause 3 of the Constitution of the United States, involves a Federal "title, right, privilege or immunity" within the meaning of this section. *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U. S. 419, 427; see *Hinderlider v. La Plata Company*, 304 U. S. 92, 110. Since the decision of the West Virginia court necessarily involved substantial questions of interpretation of the Ohio River Valley Water Sanitation Compact, an interstate compact which had received the consent of Congress, this case clearly presents substantial Federal questions which are properly justiciable in this Court.

2. Furthermore, the validity of the Compact presents an issue for resolution by this Court under 28 U. S. C. 1257 (3), and in its review of the West Virginia's court's decision the Court would not be bound by the State court's determination of the meaning of the State constitution and statutes, or of the internal authority of the State to enter into the Compact. *Kentucky v. Indiana*, 281 U. S. 163, 176-7; *Virginia v. West Virginia*, 11 Wall. 39, 56; 220 U. S. 1; 28; see also *Hinderlider v. La Plata Co.*, 304 U. S. 92. In a controversy with respect to a contract between States,

the courts of one of the parties cannot be endowed with final authority to determine the validity of the agreement, or the capacity of one of the contracting parties to adhere to it. This Court must necessarily have full power and duty to determine for itself all the issues of validity and interpretation that may arise, even though they involve questions of local legislation and State authorization. *Kentucky v. Indiana, supra*; *Virginia v. West Virginia, supra*. While these leading cases ~~cited above~~ were ones in which the original jurisdiction of the Court was invoked in suits between States, the same principles appear applicable to the present case in view of the manifest interest of the other States who are signatories of the Ohio River Valley Water Sanitation Compact, and of the effect of the decision below upon the continued operation of that interstate agreement.¹

In the comparable case of suits involving alleged impairment of the obligation of State contracts, this Court, while giving appropriate respect to the decisions of State courts on interpretation of their own statutes and constitutions, has not considered itself inexorably bound by such interpretations. In such cases, this Court has

¹ In *Hinderlider v. La Plata Co.*, 304 U. S. 92, 110-111, the Court expressly held that it had jurisdiction (and would exercise it) to determine the validity and effect of a compact even though the States which were parties to it were not before the Court. Like this, that case came from a State Supreme Court.

reached its own conclusions on all issues pertaining to the validity and construction of the contract. *Larson v. South Dakota*, 278 U. S. 429, 433; *Stearns v. Minnesota*, 179 U. S. 223, 232-233; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S. 486, 499-503; *McCullough v. Virginia*, 172 U. S. 102, 109.

3. Finally, the case presents substantial questions under the Federal constitution as to the inherent powers of States to enter into interstate compacts of this nature with the consent of Congress. Petitioners argue that the provisions of Article I, Section 10, Clause 3 of the Constitution must be read as an affirmative grant of power to States to enter into interstate compacts, subject only to the necessity of obtaining the consent of Congress; that this provision of the Federal constitution necessarily takes precedence over all State statutes and constitutions; and that any attempt by a State, by its Constitution or otherwise, to impose further limitations on its power to enter into such compacts must fail because of conflict with the Constitution of the United States. Since we believe that the case can be disposed of in favor of petitioners without passing upon this delicate issue, we take no position as to the ultimate validity of petitioners' argument on the point. But there can be no doubt that it presents grave and fundamental questions of the proper construction of an important clause of the

Federal Constitution, and is therefore plainly within this Court's jurisdiction.

B. The title, right, privilege or immunity here asserted has been "specially set up or claimed", within the requirements of 28 U. S. C. 1257 (3). The rule is that where it clearly and unmistakably appears from the opinion of the highest court of the State in which a decision could be had that a Federal question was fully considered and a ruling on the Federal question was essential to the judgment rendered, there is sufficient compliance with the above requirement. *San Jose Land and Water Co. v. San Jose Ranch Co.*, 189 U. S. 177, 180; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 299; *Whitfield v. Ohio*, 297 U. S. 431, 435; *Charleston Association v. Alderson*, 324 U. S. 182, 185. The majority and dissenting opinions in the West Virginia court both indicate clearly that the court did in fact consider the interpretation and validity of the Compact and its judgment necessarily involved those issues.

C. Nor is there any doubt that the relators—the Commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission who, with the other members of that Commission, are charged with the duty of carrying out the provisions of the Compact—have an interest in this case sufficient to invoke the jurisdiction of this Court. *Coleman v. Miller*, 307 U. S. 433, 441-445. See also *Hinderlider v. La*

Plata Company, 304 U. S. 92; *Blodgett v. Silverman*, 277 U. S. 1.

II

THE OHIO RIVER VALLEY WATER SANITATION COMPACT DOES NOT BIND THE SIGNATORY STATES IN PERPETUITY BUT IS REVOCABLE BY UNILATERAL LEGISLATIVE ACTION.

The State Supreme court founded its holding that the Compact is invalid, insofar as West Virginia is concerned, on the view that the Compact and the ratifying act, if valid, (1) would bind future legislatures to make appropriations for the activities of the Commission and this would amount to the creation of a debt in violation of the provisions of section 4, Article X of the Constitution of West Virginia (R. 29),² and (2) would delegate police power of the State "in perpetuity", so as to put it beyond the power of future legislatures to withdraw the delegation (R. 29, 31). The court thus indicated that it believed that the Compact is irrevocable, and that future legislatures either have no choice as to the State's continued participation in the Commission's ac-

² This section reads as follows:

No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

tivities or, by withdrawal, would subject the State to a suit for damages by the other signatories. In taking this position, we believe that the court below adopted an erroneous view of the Compact, which necessarily affected its determination of the constitutional questions before it. Once that unsound interpretation of the Compact is corrected, there can be little doubt as to the resolution of the other issues in the case (see Point III, *infra*).

A. ABSENT SPECIFIC PROVISION TO THE CONTRARY, A COMPACT OF THIS CHARACTER SHOULD BE CONSTRUED AS PERMITTING EACH SIGNATORY TO WITHDRAW

In our view, the Compact is not irrevocable but may be abrogated by appropriate legislative action which may be taken by any signatory State unilaterally. While the Compact does not contain any express provision for termination, it nowhere expresses the intention of binding a signatory State in perpetuity, and we believe that a State contract of this type, not specifying any termination date, should not be construed as perpetually limiting the State in the exercise of its continuing governmental powers. Established principles, consistently applied in analogous circumstances, demonstrate that this construction of the Compact is the preferable one.

1. To commence with the ordinary rules of contract law, it is well settled that a contract between private parties, other than a contract of

marriage, which contemplates continuing performance for an indefinite time is not to be construed as being irrevocable. 1 Williston on Contracts, sections 38 and 39 and the cases there cited. It has been held that such contracts are terminable at will, after due notice, or after a reasonable time which must be determined as a question of fact from the apparent intention of the parties. Each of the contracting parties will ordinarily have some right of termination.

In the field of State contracts with private persons, the Court has been loath to conclude, where large public interests and governmental powers are concerned, that an agreement of indefinite duration was not terminable at will, unless there are clear words indicating that such a right of revocation was not reserved. In *Newton v. Commissioners*, 100 U. S. 548, for instance, the Court had before it an act of the legislature of Ohio establishing the Town of Canfield as the county seat of Mahoning County and a subsequent act for the removal of the county seat to Youngstown. The earlier statute required assurances from inhabitants of Canfield before the town could be "permanently established" as the county seat. It was contended that this statute created a contract, the obligation of which was impaired by the later act. The Court held that, even if the first act and the proceedings under it constituted a binding contract, the subse-

quent legislation would still not be invalid or constitute a breach of the agreement. In view of the public and governmental nature of the contract's subject matter, it could not be read as restricting the power of later legislatures or as assuming a perpetual non-terminable obligation. (Pp. 559, 561-2.)

A still more striking instance is found in *Illinois Central Railroad v. Illinois*, 146 U. S. 387. There, the Court had under consideration a grant by the State of Illinois purporting to convey to the railroad company "in perpetuity" rights in certain lands covering more than 1,000 acres underlying the harbor of Chicago. This grant was subsequently revoked by a later act of the legislature which the company attacked on the ground it impaired the obligation of its contract. The Court upheld the subsequent act revoking the grant on the ground that any action by which the legislature transferred to a private corporation dominion over so important a segment of the navigable waters of the State was "necessarily revocable" and not designed to be beyond change or rescission (pp. 455, 460-462, 466).

Moreover, compacts between States partake, in some measure, of the nature of treaties between sovereign states (see *Hinderlider v. La Plata Co.*, 304 U. S. 92, 104; *Poole v. Fleeger*, 11 Pet. 185, 209), and aid in interpreting them can be secured from the rules of international law governing the

construction of treaties. While there is no universal agreement as to which types of treaties may be unilaterally denounced even though they contain no termination provisions, it is recognized that implication *vel non* of such a unilateral power depends on the nature and purpose of the particular treaty. The instant Compact may be likened, in its tentative character, to commercial or trade treaties which are generally thought to be terminable without mutual agreement. McNair, *The Law of Treaties* (1938), pp. 362-4, 367-8; Brierly, *Law of Nations* (1942), p. 201.³

2. Applying the foregoing principles to the Compact under consideration, it is evident, as the West Virginia court recognizes, that the Compact requires a continuing exercise of governmental functions by the signatory States. For that very reason, the West Virginia court erred in holding that the Compact, which is silent on the power of the State to terminate its adherence, necessarily involves binding obligation to continue indefinite participation, instead of construing the Compact as admitting of withdrawal at will. The

³ The law on the point may still be regarded as unsettled, but nations have also taken advantage of such doctrines as that of "rebus sic stantibus" in order to escape from burdensome treaty obligations, especially where it is claimed that the circumstances under which the treaties were first entered have changed. See, e. g., Bullington, *International Treaties and the Clause "Rebus sic Stantibus"* (1927), 76 U. Pa. L. Rev. 153; Moore, *Digest of International Law* (1906), sec. 770-780; 5 Hackworth, *Digest of International Law* (1943), sec. 511.

very considerations recognized by the West Virginia court—the importance of maintaining continuing authority in the legislature to regulate activities bearing on the public welfare as circumstances may require; the freedom from past commitments which each legislature should have in dealing with regulatory problems facing it at that particular time—emphasize, we believe, that the signatory States did not intend to bind themselves in perpetuity to the continuing exercise of their police powers as the Compact directs. If a signatory State should decide, after some time, that its pollution difficulties were increased rather than decreased by operations under the Compact, it would be free to withdraw and adopt some other solution; the State could, by appropriate legislative action revoking the Compact as it relates to it, relieve itself of the necessity of continuing to exercise these governmental functions in the particular way required by the Compact. Moreover, the nature of the Compact, calling for continuing cooperation among the signatory States, furnishes another reason why the lower court's interpretation is improbable. Cooperation generally rests on continuing, and not enforced, consent.

The specific language of the Compact, in Article VII supports this position. Article VII provides:

Nothing in this compact shall be construed to limit the powers of any signatory

State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

The plain meaning of the first clause of the foregoing sentence appears to be to reserve complete freedom of action to subsequent legislatures to take such action as they may deem necessary with regard to exercise of police power, making appropriations, or any other governmental function. On this point we believe that the dissenting opinion below of Judge Given correctly interpreted the Compact. Judge Given said (R. 34) :

Does the compact in effect bind in any manner future Legislatures of this State, or does the compact grant any power or right in perpetuity? Article VII of the compact provides: "Nothing in this compact shall be construed to limit the powers of any signatory State. * * *." In the face of this clear reservation to "any signatory State" of the "powers" of such state, I cannot believe that the intention to grant, in perpetuity, any power whether the police power or the power to make appropriations, can be read into the compact. The plain meaning of the language seems to be that the compact shall be so construed that no limit shall be placed upon any power

of any signatory state as to any future action thereof. If this be correct, then there is no granting of any police power or any other power, in perpetuity, and no future Legislature is bound or attempted to be bound as to any such police power or as to the making of any future appropriation.

3. Another weighty and, we believe, decisive argument favors the interpretation of the Compact outlined above:—application of the firmly established canon that wherever possible an act of a legislature will be given an interpretation which will avoid unconstitutionality or even the raising of serious constitutional questions. The opinion of the Supreme Court of Appeals of West Virginia points to serious State constitutional questions as to the validity of the Compact and of the ratifying act of the West Virginia Legislature, if they are construed to be binding upon the State in perpetuity.* These questions are not presented if the Compact is construed as leaving the legislature of the State free to take such action in the future as it may deem necessary and appropriate for the carrying out of its police power and appropriation functions. As we have pointed out, the Compact itself is silent on the point of duration, and a construction making it unilater-

* The same questions are probably presented under the Constitutions of the other signatory States. See *infra*, pp. 53-54, 57-60.

ally revocable by appropriate legislative action is reasonable and is grounded both in the Compact's terms and in the principles applicable to agreements of this type.⁵

4. It is true that this Court has in some cases held that States may not enact subsequent legislation inconsistent with, or withdrawing from, previous interstate compacts. *Greene v. Biddle*, 8 Wheat. 1; *Virginia v. West Virginia*, 11 Wall. 39. Analysis of these cases, however, demonstrates their dissimilarity to the one now before the Court, in that they involved the protection of rights which had vested as a result of interstate compacts. None of these cases involved the continuing exercise of governmental powers, unrelated to private property rights. Thus, in *Greene v. Biddle, supra*, this Court considered the validity of a Kentucky statute purporting to vest title to land in a class of individuals. The Court held the statute unconstitutional as impairing the obligation of a contract, in that the title to these lands had already vested in other persons pursuant to an interstate compact between Kentucky and Virginia. This case clearly involved no determination that the State of Kentucky or any other State could not with-

⁵ It is well established that treaties, a comparable form of agreement, should be liberally construed to effectuate the intent of the parties. *Bacardi Corp. of America v. Dome-nech*, 311 U. S. 150, 163; *Valentine v. U. S. ex rel Neidecker*, 299 U. S. 5, 10; *Jordan v. Tashiro*, 278 U. S. 123, 127-30.

draw from compacts calling for continuing exercise of governmental powers where vested rights are not affected. In subsequent cases dealing with the same compact, this Court refused to extend the implications in its decision of *Greene v. Biddle* beyond the circumstances of that particular case. *Hawkins v. Barney's Lessee*, 5 Pet. 457; *Kentucky Union v. Kentucky*, 219 U. S. 140.⁶

B. NO PROVISION OF THE COMPACT REQUIRES THAT IT BE CONSTRUED AS BARRING WITHDRAWAL.

None of the specific provisions of the Compact imply that a signatory is barred from withdrawing. Article X provides for appropriations by the participating States,⁷ but it obviously applies

⁶ Moreover, this Court has even upheld State action on matters within the scope of its powers as a sovereign State, although contrary to a stipulation incorporated in the Federal enabling act for its admission to the Union which was concurred in by the State at the time of entry. *Coyle v. Oklahoma*, 221 U. S. 559.

⁷ Article X reads as follows:

The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States, one-half of such amount to be prorated among the several States in proportion to their population within the District at the last preceding federal census, the other half to be prorated in proportion to their land area within the District.

This Article should be read in connection with certain paragraphs contained in Article V, as follows:

The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its

only so long as the State is a party to the Compact and a member of the Ohio River Valley Water Sanitation Commission. Articles VI and IX, containing the regulatory provisions, are likewise applicable only so long as a State maintains its adherence to the agreement. And if Article XI, governing the coming into effect of the Compact,^{*} is at all relevant to the issue of termination, it carries the affirmative implication that a State may withdraw, since it expressly provides that the Compact can be effective and the Commission operate with less or more members than the original signatories. All the other Articles of the Compact are similarly consistent with a purpose to permit withdrawal by unilateral action.

estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

* * * * *

The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof.

⁸Article XI reads:

This compact shall become effective upon ratification by the legislature of a majority of the States located within the District [i. e., the signatory States] and upon approval by the Congress of the United States; and shall become effective as to any additional States signing thereafter at the time of such signing.

III

IF THE COMPACT PERMITS WEST VIRGINIA TO WITHDRAW WHENEVER ITS LEGISLATURE SO DETERMINES, ADHERENCE TO THE COMPACT CLEARLY DOES NOT CONTRAVENE ANY LIMITATION BINDING ON THE STATE

If the Compact be read, as we urge in Point II, to permit unilateral withdrawal by any of the signatory states, there can be no doubt that the Compact and implementing state legislation are entirely consistent with the provisions of the West Virginia Constitution to which the court below adverted, and plainly within all the limitations on the State which the court invoked, and there is, therefore, no basis for respondent's refusal to allow the appropriated monies to be paid over. There is no indication that the State Supreme Court, had it read the Compact correctly, would have disagreed with this conclusion, but, in any case, we believe (as stated *supra*, pp. 18-20), that this Court is free, in this proceeding, to construe the State Constitution independently.

A. NO PROHIBITED "DEBT" IS CREATED.

Article X, section 4, of the State Constitution, (*supra*, pp. 2-3) prohibits the contracting by the State of a "debt" except for five designated purposes, none of which would cover the present Compact's aims. The State Supreme Court thought that since the Compact, in its view, bound future legislatures to make appropriations for

the continuation of the Commission's activities, the Compact necessarily created a forbidden "debt" (R. 29). If, however, future legislatures are not so bound, the infirmity in the State's adherence to the Compact which the State court deemed to exist would be completely removed. For the State can hardly be said to have "contracted" a "debt", in any proper sense, if the obligation to appropriate the State's *pro rata* share of the Commission's annual expenses can be terminated for the future by withdrawal from the Compact. Appropriations for the Commission are then on exactly the same basis as those necessary to meet the State's other current expenses.⁹

It may be noted, in addition, that the State's obligation to make payment is further qualified in a manner showing that it is not equivalent to the "contracting" of a "debt". Article X of the Compact (fn. 7; *supra*, p. 31), requires the Commission's annual budget to be "approved by the Governors of the signatory States" and provides for State appropriations only after the budget is approved; and Article V (fn. 7; *supra*,

⁹ Article V of the Compact prohibits the Commission from incurring "any obligations of any kind prior to the making of appropriations adequate to meet the same", and requires it to "submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof (see fn. 7, *supra*, pp. 31-32).

pp. 31-32) requires the Commission to submit its budget to each Governor at the time he requests, and forbids it from incurring any obligation prior to the making, by the signatory States, of appropriations adequate to cover the obligation. Continuous participation and consent on the part of each of the signatories to the incurring of every Commission obligation is thus assured at all times.

In short, if a signatory State has power to terminate its adherence to the Compact and thus prevent the arising of any obligation in the future, and if, even in the absence of such action of termination, the creation and extent of the State's obligation depends on affirmative action and review by the Chief Executive of the State, it must follow that the Compact does not amount to the "contracting" of a prohibited "debt". Perhaps the most significant confirmation of the correctness of this position is the fact that the Constitutions of most of the other signatory States contain similar debt provisions, for it is, of course, most improbable that the Compact's negotiators and the ratifying legislatures would have agreed to violate their own fundamental laws. See *infra*, pp. 53-54, 57-60.

B. THE "POLICE POWER" OF THE STATE IS NOT INVALIDLY DELEGATED.

The Supreme Court of Appeals also held that the State act approving and enacting the Compact into law was unconstitutional because it

delegated police power of the State in perpetuity and to an agency of other States and the Federal Government. The court did not refer to any specific provisions of the State constitution but based its position on general principles of constitutional law, which would, if valid, be applicable to any State within our constitutional system. It construed the Compact as alienating a basic legislative power of the State beyond the control of the legislature. The court said (R. 29, 30-31) :

We think a reading of the compact creating such commission will disclose that this State has delegated and vested in such commission, *in perpetuity*, a substantial part of its police power, so far as that power relates to the control of our streams, which power may be exercised by the said commission as a whole, and by which, with one exception to be hereafter noted, can if so desired be controlled and used by commissioners from other States in conjunction with commissioners appointed by the Federal Government.

* * * * *

By common sense and necessity, the use of the police power of the State is vested in that branch of the government through which the people speak, namely, the Legislature; but it is a power, which, being within legislative control, cannot be *permanently* bartered away or alienated by any

one Legislature. It is a power which must always remain in existence, and subject to legislative use when necessity arises. This being true, when a Legislature undertakes to delegate to any citizen, any municipality, or any other agency of the government inside the State, *in perpetuity*, or attempts to make a compact with another state or states, or with the Federal Government, by which it so delegates a part of its police power to be used within this state or outside this state, it attempts to do something which it does not possess the power to do. While it possesses the power to delegate the police power to governmental agencies within the State, it does not, in our opinion, possess the power to delegate any portion of that power to another state or to the Federal Government or to a combination of the two. [Italics added.]

For the reasons outlined below, we believe the court erred in this holding.

1. If the compact does not bind the future legislatures of signatory States but is revocable by appropriate legislative action, it is clear that, even if police power were delegated by the Compact, it was not delegated in perpetuity and the legislature has not abandoned the right to control its future exercise. The first ground of the West Virginia court's holding, therefore, cannot be sustained under a proper interpretation of the Compact.

2. The court below does not appear to hold that the Compact improperly confers "legislative" powers on the Commission, but we should, nevertheless, like to make it clear that the powers granted by the Compact are merely such as are customarily conferred on administrative agencies of State governments. In general, these powers consist of those appropriate for administration of a water pollution control program in the Ohio River Valley. Insofar as they relate to the "police power", they consist of the setting of standards of water quality and promulgation of rules and regulations under Article VI, and the issuance and enforcement of pollution abatement orders under Article IX. In addition, the Commission is directed, in Article VIII, to conduct studies, investigations and research, make recommendations for uniform legislation and consult with appropriate agencies on pollution problems. Article I states the underlying legislative policy of maintaining the waters of the Ohio River Basin in a satisfactory sanitary condition for all legitimate uses, and standards are prescribed for establishment of standards of water quality in the waters of the basin.

From the foregoing, it is clear that the Compact does not attempt to delegate any "legislative" power to the Commission. Rather, it states a general policy and establishes standards, within the framework of which the Commission is given

administrative powers sufficient to carry out the policy. In this respect, the Compact is similar to a large number of State statutes conferring powers at least equally broad on agencies charged with responsibility for administration of water pollution control programs within particular States. Specifically, they do not differ substantially from those of the State Water Commission of West Virginia under the water pollution control act of that State. West Virginia Code (1949), sections 1401-1409 (6/7). Indeed, the powers of the Ohio River Valley Water Sanitation Commission are less than those possessed by a large number of State agencies in that they do not include the power to issue permits as a condition precedent to the discharge of wastes into waters under the Commission's jurisdiction.

We have found no decision holding that conferring of such powers on administrative agencies results in unconstitutional delegation of legislative authority. Broader delegations than this have been sustained by the Supreme Court of Appeals of West Virginia. *State v. Buhner*, 126 W. Va. 280, 27 S. E. 2d 823; *West Central Producers Cooperative v. Commissioner*, 124 W. Va. 81, 20 S. E. 2d 797. The West Virginia court has likewise had occasion to consider the water pollution control act of that State and has not suggested that the Act might be considered invalid on this ground. *Danielley v. City of Princeton*, 113 W. Va. 252, 167 S. E. 620.

3. As stated above, the opinion of the West Virginia Supreme Court of Appeals contains nothing contrary to the foregoing contention that the Commission possesses powers no broader than those customarily vested in State administrative agencies. The West Virginia court apparently found a ground of distinction, however, in the fact that the powers given to the Commission were created by an interstate compact rather than by the statute of a single State and were conferred on an interstate agency rather than on an integral part of a State government.¹⁰ The distinction is valid only if (i) the Commission as established under the Compact is not an agency of any signatory State but is separate and apart from each of them, and (ii) the legislatures of these States cannot utilize such an administrative agency to control water pollution problems common to each of them. Neither proposition appears to us to be tenable.

(a) The Ohio River Valley Water Sanitation Commission is not an entity separate and apart

Because of its stress on the alleged delegation of powers "permanently" and "in perpetuity" (*supra*, pp. 36-37), we are not certain that the court below would have rendered the same decision on the "delegation of police power" point if it had read the Compact as we suggest in Point II, *supra*. It may very well be that the court's entire discussion of this point rests on its view that the Compact bound the State permanently, but we treat the argument as if the court held that the State could not delegate any functions to the Commission even though the State could withdraw from the Compact and the Commission at any time.

from the signatory States but is the agency of each of them. Through this agency the States of the Ohio River Basin accomplish, in the language of the preamble of the Compact, "the control of future pollution and the abatement of existing pollution in the waters of said basin * . * . * through the cooperation of the States situated therein, by and through a joint or common agency."

The Commission is made up of representatives of each of the various States "chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed," and it is further provided that "any commissioner may be removed or suspended from office as provided by the law of the State from which he shall be appointed."

Article IV:

In enforcement proceedings against any person in West Virginia, the Commission is bound by the following provision of Article IX of the Compact:

No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect *unless and until it receives the assent of not less than a majority of the commissioners from such state.* [Italics supplied.]

Thus, regardless of the powers and duties which may have been conferred upon the Commission as a whole, the enforcement power with respect to citizens of any particular State has been retained in the hands of the Commissioners from that State. Such Commissioners are appointed pursuant to the laws of the State and may be removed as provided in the laws of the State.¹¹ (The West Virginia act ratifying the Compact provided for removal of the West Virginia Commissioners by the Governor of that State.) They are thus accountable to their own States rather than to the Commission as a whole which has no power to take action against them in any way. It follows that the Commission, at least insofar as its regulatory functions affect the citizens of West Virginia, must be considered to be an agency of the State of West Virginia. The police power of the State, therefore, is retained in an agency of the State. Accordingly, we do not believe, ~~therefore~~, that the West Virginia court was correct in describing the Compact as delegating a portion of the State's police power "to another state or to the Federal Government or to a

¹¹ Article IV of the Compact provides, in part:

The commissioners from each State shall be chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed, and any commissioner may be removed or suspended from office as provided by the law of the State from which he shall be appointed.

combination of the two." Rather, the Compact creates a "joint or common agency" of each and all of the States signatory thereto.

(b) That the legislature of West Virginia may utilize such an agency to accomplish proper purposes, such as control of water pollution, should not be doubted. "The power to contract and the power to select appropriate agencies and instrumentalities for the execution of state policy are attributes of state sovereignty. They are not lost by their exercise." *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 526. In our federated system of government, the several States, while in many respects sovereign, are bound together in a single political entity and by closely intermeshed economic and social relationships. They must necessarily have power to take cooperative action in solution of their common problems and to make use of appropriate agencies to make such cooperation effective.

Pursuant to this principle, States have by compact given agents of another State police authority within their territory. A striking example of this is the long-standing compact between New York and New Jersey concerning jurisdiction over the Hudson River. Compact of June 28, 1834, 4 Stat. 708. In 1834, the two States agreed, with the consent of Congress, that the boundary between them should be located in the middle of the river. It

was further agreed, however, that with certain specified exceptions the State of New York should have exclusive jurisdiction over the entire river up to the New Jersey shore. This provision has been interpreted by the courts of both States as conferring jurisdiction on the State of New York over the entire river, including that portion lying on the New Jersey side of the territorial boundary, for purposes of police control and the applicability of New York penal statutes. *Ferguson v. Ross*, 126 N. Y. 459, 27 N. E. 954; *People v. Central Railroad Co. of New Jersey*, 42 N. Y. 283; *State v. Babcock*, 30 N. J. L. 29. This Court, while not passing directly on the question of penal jurisdiction, has indicated that it would follow the views of the New York and New Jersey courts in the interpretation of this compact. See *Central Railroad Co. v. Jersey City*, 209 U. S. 473, 479. The famous Port of New York Authority is another example of co-operative action between New York and New Jersey—this time through a special joint agency. 42 Stat. 174, 822.

In numerous other instances, the courts have sustained the power of the States by compact to provide for cooperative action in the exercise of their police power. Thus, where an interstate compact gave Kentucky and Indiana concurrent jurisdiction over the Ohio River for service of process, this Court sustained the validity of serv-

ice by Indiana officials on the Kentucky side of the boundary between the two States. *Wedding v. Meyler*, 192 U. S. 573; cf. *Central Railroad Co. v. Jersey City*, 209 U. S. 473. Cases arising under the Interstate Compact for Supervision of Parolees and Probationers have recognized the right of a State, through its representatives, to enter another State and remove therefrom an individual on parole from a sentence of imprisonment in the former State. *Ex parte Tennen*, 20 Cal. 2d 670, 128 P. 2d 338; *Gulley v. Apple*, 213 Ark. 350, 210 S. W. 2d 514. That compact received the assent of Congress in 1934 in an act authorizing "any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." Act of June 6, 1934, 48 Stat. 909, 18 U. S. C. 420. Forty-five States, including West Virginia, have now ratified the Interstate Compact for Supervision of Parolees and Probationers. Council of State Governments, *Book of the States*, 1950-51, p. 45.

States have also entrusted administrative responsibilities to agencies of the Federal Government, and their power to do so has been upheld. *Ex parte Lasswell*, 1 Cal. App. 2d 183, 36 P. 2d

678; *Underwood Typewriter Co. v. Chamberlain*, 94 Conn. 47, 108 Atl. 154. Indeed, on occasion, States have even entrusted private bodies, sometimes corporations organized in other States, with the exercise of administrative functions relating to the police power. *Nicchia v. New York*, 254 U. S. 228; *Ex parte Gerino*, 143 Cal. 412, 77 P. 166; *Whaley v. State*, 168 Ala. 152, 52 S. 941. If a State may confer such powers on private associations, *a fortiori* it may give them to a public body established by statute as a joint agency of the State and other States.

In this connection, it may be noted that section 2869 of the West Virginia Code of 1949 limits the practice of medicine to persons graduating from class "A" medical schools, as classified by the Council on Medical Education and Hospitals of the American Medical Association and other professional associations. The Board of Medical Examiners of West Virginia is likewise authorized by this statute to waive the requirement of examination before the Board and accept in lieu thereof a certificate from the National Board of Medical Examiners or the licensing agency of another State or of a foreign country. This act has been upheld by the Supreme Court of Appeals of West Virginia as a valid exercise of the State's police power. *State v. Morrison*, 98 W. Va. 289, 127 S. E. 75; *Thomas v. State Board of Health*, 72 W. Va. 776, 79 S. E. 725.

Control of pollution of our great rivers presents an instance peculiarly appropriate for interstate cooperation. Because of the interstate nature of these streams and the effect of upstream waste discharges on downstream waters, action by individual States, acting alone, cannot correct the evils of pollution. This was recognized by this Court, speaking through Mr. Justice Clarke, in *New York v. New Jersey*, 256 U. S. 296, 313, in the following language:

We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.

The most effective means of securing such cooperation is through the establishment of an interstate agency such as the Ohio River Valley Water Sanitation Commission. This is attested by the large number of interstate agencies that have been created in this field. Beside the one here in controversy, reference may be made to the Interstate Commission on the Potomac River Basin, the New England Interstate Water Pollution Control Commission, and the Interstate Sanitation Com-

mission dealing with waters of Long Island Sound and New York Bay.¹² The validity of agreements establishing these agencies, as well as all other agreements between States for cooperative exercise of police power, will be cast in doubt if the decision of the West Virginia court stands. That court did not base its decision on provisions peculiar to the constitution of that State. Rather, it relied on general principles as to what it conceived to be the inherent limitations on the power of the legislature of any State in the Union. If its decision is sound as to West Virginia, it is equally applicable to all other States.

For the reasons stated above, we do not believe that the West Virginia court's decision is sound as to West Virginia or any other State. The Compact did not divest the signatory States of any police power. On the contrary, in Article VII it specifically reserved to the States complete freedom of action in the future.¹³ What the Compact did was merely to establish a "joint and

¹² The policy of Congress, as expressed in section 2 (b) of the Water Pollution Control Act, 62 Stat. 1155, is expressly to encourage interstate compacts in this field.

¹³ Article VII provides:

Nothing in this compact shall be construed to limit the powers of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

common agency" of all the States through which they might cooperate in carrying out a common purpose. Nothing in the constitution of West Virginia or in the Constitution of the United States forbids the State to make such use of such an agency. In invalidating West Virginia's adhérence to the Compact, the court below misconceived the structure of, and the limitations imposed upon, the State's government under our federal form of polity. That misconception this Court is free to correct, in determining West Virginia's obligations and the other States' rights under the Compact.

IV

EVEN IF THE COMPACT DOES NOT PERMIT READY WITHDRAWAL, WEST VIRGINIA MAY VALIDLY ADHERE TO IT

Though resolution of the State law issues dealt with by the court below is somewhat more difficult if it be assumed that the Compact bars withdrawal at will, we submit that even on that construction West Virginia's adhérence was valid. We assume, in this Point, that the Compact has some period of compulsory duration which need not now be definitely determined, and that a State may not, therefore, withdraw at will, but may properly withdraw (absent reudiation or serious breach by the other parties) only after, for example, some reasonable period of operation, or upon a sufficient change of cir-

cumstances warranting invocation of some equivalent of the doctrine of "*rebus sic stantibus*" in international law.¹⁴

Even on this reading of the Compact, the lower court's unique view that West Virginia is powerless to join is erroneous, and it should not be permitted to prevail in this suit testing the validity of the State's adherence. This Court can, and should, hold that West Virginia has full capacity to ratify the Compact and to perform the resulting obligations.

A. "Debt."—Article X, section 4, of the State Constitution in terms prohibits no more than the "contracting" by the State of a "debt."

Supra, pp. 2-3. At most, the Compact creates not a present "debt" but a future and contingent obligation, dependent upon the extent of the Commission's activities each year and the budget approved by the Governors of the participating States. The sum West Virginia may be called upon to appropriate can vary from zero—in a year of complete inactivity—up to whatever amount West Virginia's Governor will approve in a particular year. As we have pointed out (*supra*, pp. 33-35), (1) the Commission's annual budget must always be "approved by the Governors of the signatory States" (Article X),

¹⁴ We believe it highly unlikely that the Compact can be read as perpetual in duration, and binding on the parties for all time or until they all agree to rescind it.

including the Governor of West Virginia, (2) no appropriation need be made by the State until the budget is approved (Article X), and (3) the Commission may not "incur any obligations of any kind prior to the making of appropriations adequate to meet the same" (Article V). There is, therefore, no definite sum which is now owing from West Virginia to the Commission on account of the Commission's future activities. There can be no more, now or at any other time, than a present obligation on the State to pay its share of the expenses of such activities as the Commission may undertake in the future, while West Virginia is still a member, and with the express approval, at all times, of West Virginia's Governor.

Such a future and contingent obligation does not constitute a "debt" within the meaning of constitutional provisions such as Article X, section 4. There is a traditional difference between a debt and a contract for future indebtedness. As this Court observed in *Walla Walla v. Walla Walla Water Company*, 172 U. S. 4, 20:

There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt

be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

See also *Williams v. City of Raceland*, 245 Ky. 212, 53 S. W. 2d 370. Similarly, an indeterminate and indefinite liability, whose amount cannot be ascertained until the occurrence of some future event, has been held not to constitute a "debt" within the meaning of constitutional debt limitations comparable to that here involved. *City of Chicago v. Galpin*, 183 Ill. 399, 55 N. E. 731; *City of Oakland v. Williams*, 15 Cal. 2d 542, 103 P. 2d 168.

Decisions of the court below, construing the debt provisions of the West Virginia Constitution, have been consistent with these principles. That court has repeatedly upheld the validity of long-term commitments by municipalities to pay for the furnishing of public services, such as light and water, in spite of the provisions of Article X, Section 8, of the State constitution limiting the incurring of indebtedness by municipalities. *Allison v. City of Chester*, 69 W. Va. 533, 72 S. E. 472; *Appalachian Electric Power Company v. State Road Commission*, 117 W. Va. 200, 203, 185 S. E. 223. Moreover, the constitutional prohibition against incurring of debts by the State has

not been interpreted to prevent the legislature from providing for appointment of State officials at specified salaries for terms of years covering sessions of several successive legislatures. See *Blue v. Tetrick*, 69 W. Va. 742, 72 S. E. 1033; W. Va. Code (1949) Secs. 654, 2547. Such statutes could not be sustained under the debt provisions unless the State constitution is interpreted as permitting the legislature to subject the State to possible future financial obligations.

Any doubts which would be raised by Article X of the State Constitution as to the ability of the State to adhere to the Compact, if construed not to be revocable at will, should be resolved by noting that the constitutions of each of the signatory States contain restrictions on the contracting of debts by the legislature which might cast doubt upon the power of the State to ratify the Compact if ratification of the Compact amounted to the contracting of a debt. In the case of Pennsylvania, Virginia, Ohio, Indiana, and Kentucky, particularly, the provisions of the State constitutions, in their pertinent part, closely resemble those of section 4, Article X, of the West Virginia Constitution. See Appendix, *infra*, pp. 57-60. It must be assumed that the negotiating commissioners appointed by the Governors of the respective States, as well as the ratifying legislatures, were not without knowledge of these existing con-

stitutional limitations—on their several States. Indeed, both Article X and Article V of the Compact reflect a lively respect for State fiscal processes and concern to prevent the arising of actual obligations, either on the part of the Commission or of the signatory States, in the absence of continuing State action and consent.

B. "Delegation of Police Power"—Our previous discussion (*supra*, pp. 38–49) of the lower court's holding as to delegation of authority, though it assumes that the Compact permits easy unilateral withdrawal, equally demonstrates the error in the holding below on this point, even on the view that West Virginia cannot withdraw as freely as we believe. As we have shown, the powers granted to the Commission are sufficiently circumscribed and guarded (*supra*, pp. 38–39). And the Commission is clearly an agency of the State, which cannot take enforcement action against West Virginians, or other persons within the State's territory, without the concurrence of a majority of West Virginia's own Commissioners, whose appointments and terms are controlled under Article IV of the Compact (*supra*, pp. 40–49).

We know of nothing in the West Virginia constitution, or in the general principles on which American governments are founded, which pro-

hibits the State from agreeing to make such limited use, for a term, of an agency like the Ohio River Valley Water Sanitation Commission. The New York-New Jersey compact of 1834 has been in effect for over a century, and the Port of New York Authority has functioned since the early 1920's, without serious question. See *supra*, pp. 43-44. The La Plata River Compact between Colorado and New Mexico, in effect since 1925, providing only for modification or termination by mutual consent, set up a joint board of State Engineers for administration. *Hinderlider v. La Plata Co.*, 304 U. S. 92, 97, 109. The Virginia-Maryland compact of March 28, 1785 (the subject of *Wharton v. Wise*, 153 U. S. 155), allocating jurisdiction between the two States and expressly providing against unilateral revocation, is, we believe, still in effect. As these examples indicate, the teaching of actual practice is that, at the very least, restricted delegations of powers to interstate agencies (or to other States) of the type involved here are fully valid. It is plain that the Compact Clause of the Constitution would have very little scope, and interstate cooperation would be still-born, if the States were not free to provide for joint agencies with as circumscribed powers as the Ohio River Valley Water Sanitation Commission.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Supreme Court of Appeals of West Virginia should be reversed.

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NOVEMBER 1950.

APPENDIX

CONSTITUTIONAL PROVISIONS GOVERNING THE INCURRENCE OF DEBTS BY THE STATES OF THE OHIO RIVER VALLEY WATER SANITATION COMPACT

ILLINOIS

Article IV, section 18

* * * *Provided*, the State may, to meet casual deficits or failures in revenues, contract debts, never to exceed in the aggregate \$250,000; and moneys thus borrowed shall be applied to the purpose for which they were obtained, or to pay the debt thus created, and to no other purpose; and no other debt, except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war (for payment of which the faith of the State shall be pledged), shall be contracted, unless the law authorizing the same shall, at a general election, have been submitted to the people, and have received a majority of the votes cast for members of the General Assembly at such election. * * *

INDIANA

Article X, section 5

No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the State Debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense.

KENTUCKY

Section 49

The General Assembly may contract debts to meet casual deficits or failures in the revenue; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed five hundred thousand dollars. * * * Provided, the General Assembly may contract debts to repel invasion, suppress insurrection, or, if hostilities are threatened, provide for the public defense.

NEW YORK

Article VII, sections 9, 10, 11

§ 9. The State may contract debts in anticipation of the receipt of taxes and revenues, direct or indirect, for the purposes and within the amounts of appropriations theretofore made. * * *

§ 10. In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the State in war, or to suppress forest fires; * * *

§ 11. Except the debts specified in sections 9 and 10 of this article, no debt shall be hereafter contracted by or in behalf of the State, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein. * * *

OHIO

Article VIII, sections 1, 2, 3

§ 1. The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided.

for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed seven hundred fifty thousand dollars; * * *

§ 2. In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state; * * *

§ 3. Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state.

PENNSYLVANIA

Article 9, section 4

No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt; and the debt created to supply deficiencies in revenue shall never exceed, in the aggregate at any one time, one million dollars; * * *

VIRGINIA

Sections 184, 184a

§ 184. The general assembly may contract debts to meet casual deficits in the revenue, to redeem previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war.

§ 184a. No debt or liability except the debts specified in section one hundred

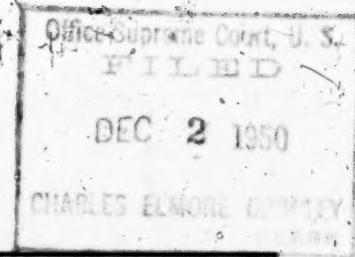
eighty-four shall be hereafter contracted by or in behalf of the State, unless such debt shall be authorized by law for some single purpose constituting new capital outlay, to be distinctly specified therein, and a vote of a majority of all the members elected to each house shall be necessary to the passage of such law. * * *

WEST VIRGINIA

Article X, section 4

No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

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Supreme Court of the United States

OCTOBER TERM, 1950

NO. 147.

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER, et al., etc., Petitioners,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE.

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The Commonwealth of Pennsylvania adopts the following provisions of the brief for the petitioner:

OPINIONS BELOW, JURISDICTION, QUESTIONS
PRESENTED, CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED.

STATEMENT OF THE CASE.

The Attorney General of Pennsylvania adopts the statement of the case in the brief for the petitioner, but submits additional facts to show that Pennsylvania has a direct and substantial interest in securing a ruling that the State of West Virginia is bound by the provisions of the Ohio River Valley Water Sanitation Compact.

The Monongahela River and its tributaries rise in West Virginia. The Monongahela is joined by the Cheat

Statement of the Case.

River at a point in Pennsylvania near the boundary between West Virginia and Pennsylvania and then flows through Pennsylvania to Pittsburgh where it meets the Allegheny River to form the Ohio River.

The total length of the Monongahela River is 128.1 miles, of which 36.5 miles are in West Virginia and 91.6 miles in Pennsylvania. The total drainage area of the Monongahela River is 7340 square miles and of this area 4612 square miles are situated in West Virginia and 2728 square miles in Pennsylvania.

The Monongahela River provides water for public water supplies in Pennsylvania serving a total population of 465,090 persons.

Fifty municipalities in West Virginia, having a population of 500 or more, discharge wastes by sewers into the Monongahela River.

Sixty-five industrial establishments in West Virginia contributes wastes through sewers into the Monongahela. Of these industries, twelve are coal washeries contributing silt and six are industrial plants contributing wastes of a chemical nature.

Under appropriate legislation Pennsylvania is requiring the treatment of sewage and of industrial wastes, including silt from bituminous coal mines.

Article VI of the Compact expressly provides that all sewage from municipalities or other political subdivisions, public or private institutions or corporations, discharged or permitted to flow into portions of the Ohio River and its tributaries, including waters which flow from one signatory state into another signatory state, as well as all industrial wastes which are permitted to

flow into such waters, shall be treated before being discharged into such waters (Petition, pp. 40-41).

Failure of West Virginia to treat sewage and industrial wastes, as provided in the Compact, will very substantially lessen the effect of the program of Pennsylvania for the purification of streams.

ARGUMENT.

I.

A STATE MAY NOT, BY THE ADOPTION OF A CONSTITUTION OR BY THE DECISION OF ITS HIGHEST COURT, DISABLE ITSELF FROM EXERCISING AN INHERENT POWER OR FROM PERFORMING THE OBLIGATIONS IMPOSED BY THE FEDERAL CONSTITUTION OR LAWS UPON IT AS A MEMBER OF THE UNION.

Prior to the adoption of the Federal Constitution every state, as part of its sovereignty, had inherent power to enter into compacts with other states:

Pcole v. Fleeger, 11 Peters 185, 209 (1837);

Rhode Island v. Massachusetts, 12 Peters 657, 725 (1830),

The Compact Clause of the Constitution necessarily recognized and affirmed the existence of this power in the states:

Pcole v. Fleeger, 11 Peters 185, 209 (1837);

Virginia v. West Virginia, 246 U. S. 565, 601, 602 (1918).

May any agency of a state or the people thereof, by the adoption of a constitution or otherwise, deny or deprive the state of this inherent power to enter into or perform a compact with other states?

Argument.

This precise question has not been decided. We suggest, however, as an analogy, the fundamental principle, that Congress may not, as a condition of admission, deprive a new state of any of the powers possessed by other states.

The decisions of this court have with finality denied the right of Congress to do this.

Thus in *Coyle v. Oklahoma*, 221 U. S. 559 (1911), the enabling act for the admission of the new State of Oklahoma required as a condition that its capital be located in a named city.

In holding this condition unconstitutional, this court, by Mr. Justice Lurton, said:

"The power is to admit 'new States into this Union.'

"'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission.

* * * (567) *

"The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty

and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission. 573)

* * * * *

*"Equality of constitutional right and power is the condition of all the States of the Union, old and new. * * *"* (575) (Italics added)

"To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." (580)

The opinion also quoted (p. 575) the following language of Mr. Justice Field in *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882) :

* * * * *

*"Equality of constitutional right and power is the condition of all the States of the Union, old and new. * * *"* (689)

Furthermore, this court has held that this principle was equally applicable in spite of the fact that the people of the state by vote expressly and unequivocally gave their consent to the condition depriving the state of the power in question.

Thus in *Coyle v. Oklahoma*, *supra*, the Constitutional Convention to form the proposed State of Oklahoma ordained that the Convention

Argument.

"do by this ordinance irrevocable, accept the terms and conditions of" the enabling act (564).

This ordinance was submitted with the constitution as a separate matter and was ratified (565).

So the condition purporting to surrender the power to locate the capital of the state was expressly and formally accepted and agreed to by the people of the proposed State of Oklahoma.

All that written language could accomplish to give consent and bind the new state, was done by its people.

We have stressed these facts because they show that the ruling was definitely made by this court that *the people of a state* could not by any act done at the time of its admission, surrender the power that was inherent in other states, or to state the principle differently, this court necessarily decided that a state or the people thereof, may not by popular vote at the time of its admission, disable the state from exercising a power inherent in other states.

What greater right, then, would a state or its people have, after admission is an accomplished fact, to surrender a recognized power of a state by their action in the adoption of a new constitution?

States so self-disabled would form a weakened and imperfect union.

Coyle v. Oklahoma holds that the framers of the constitution did not intend that Congress should have

the power, or be permitted, to impose a disability upon a state before its admission, or as a condition precedent to its admission. With equal cogency it may be reasoned that the framers did not intend that after a state had been admitted, some authority thereof—the Legislature or the Supreme Court, or even the people of the state by constitutional amendment—should be allowed to disable the state from exercising an inherent power which all states possessed, or from performing an obligation which the state had assumed or to impose any restriction on the power of the state to do so.

A new state upon admission is as fully sovereign and has the same powers as the thirteen original states or any other state. Congress may not impose any limitation upon the sovereignty of the new state, by disability or otherwise. The same reasoning applies to any self-imposed limitation or disability. There will be an even greater temptation to the people of the state to take some short-sighted action believed to further its selfish interests, than to Congress which is made up of representatives of every state and is less inclined to favor a local interest.

A state whose constitution is weakened by restrictions or disabilities is just as unfit for membership in the Union whether the same are imposed by an Act of Congress or by a clause of the State Constitution.

The restriction held invalid in *Coyle v. Oklahoma*, *supra*, affected only the internal management of that state. The restriction imposed by the Constitution or a judicial decision in West Virginia would hinder, if not wholly defeat, the purpose and performance of a compact in which other states are interested.

Argument.

Let us suppose that Congress—desiring to prevent compacts between states which might hamper Federal power — imposes as a condition to the admission of a particular state that such state have no power to enter into compacts with other states.

Even though the people of the new state voluntarily assent to this limitation, the condition would be invalid under the decisions of this court.

If the people of the state cannot assent to the waiver of a power to enter into compacts, in order to secure admission to the Union, they likewise could not by Constitutional Amendment excise from the sovereignty of the state the power to enter into compacts.

Every argument based upon the policy of preserving the integrity of the state — its possession of the same power as other states— applies equally whether the excise is made by Congress or by the people of the states themselves, and whether the people act before or after admission to statehood.

The reason and the result are the same whether the disability is created by Act of Congress or is self-imposed by amending the Constitution of the State.

It may be argued that the Constitution contains no provision that a state may not surrender or disable itself from exercising one of the inherent powers of states. Neither does the Constitution have any language prohibiting Congress from disabling a state from exercising a power as a condition of admission.

In *Coyle v. Oklahoma, supra*, this court reasoned that this restriction on the power of Congress was neces-

sary in order to preserve the equality of states and in order to preserve the integrity of the Union.

The opinion in this case further stated—

"In *Texas v. White*, 7 Wall. 700, 725, Chief Justice Chase said in strong and memorable language that, 'the Constitution, in all of its provisions looks to an indestructible Union, composed of indestructible States.' " (579)

If Congress or a state can excise one power, it can excise many, until the states are fatally weakened and neither the Union nor the states are then indestructible.

This excision of powers will be just as destructive, whether it is done by Congress or by the people of the states themselves.

Hawke v. Smith, 253 U. S. 221 (1920).

Article V of the Federal Constitution provided that an amendment shall be part of the Constitution when ratified by the legislatures of three-fourths of the several states.

This provision conferred specifically upon the legislature of a state the power to ratify or reject an amendment to the Federal Constitution.

An amendment to the Ohio Constitution provided

"* * * 'The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the constitution of the United States.' * * *" (225)

This amendment to the Ohio Constitution attempted to take the power of ratification from the legislature and vest it in the people to be exercised by a referendum.

This court held that the people by amendment to the state constitution could not deprive its legislature of its power of ratification conferred by Article V.

Second Employers' Liability Cases, 223 U. S. 1 (1912).

In this case the Supreme Court of Errors of the State of Connecticut had refused to accept or exercise jurisdiction conferred upon the courts of the state by the federal employer's liability act to hear claims for damages under it.

This action was reversed by this court.

In the opinion, Mr. Justice Van Devanter, said:

"The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

So in this case, when Congress approved the compact, it adopted the standards for the prevention of pollution, as set up therein, for this interstate stream, and the policy therein expressed became the policy for all of the territory embraced within the boundaries of the signatory states.

II.

THE DECISION OF THE SUPREME COURT OF WEST VIRGINIA THAT THE COMPACT VIOLATES THE CONSTITUTION OF THAT STATE, IS NOT CONCLUSIVE UPON THIS COURT.

It was so ruled in—

Hunterlader v. La Plata Co., 304 U. S. 92 (1938).

In this case the Supreme Court of Colorado had held that a provision in a compact between that state and New Mexico, for apportionment of water of a river between the two states, was in violation of the Colorado constitution and void (p. 99).

This court reversed and enforced the compact.

This court has repeatedly held that in order to determine whether the obligation of a contract has been impaired, it will examine the record and determine for itself whether a contract was legally made and is binding upon the party. Otherwise, the constitutional guaranty could be readily evaded by a decision of a state court that no contract existed. See *Kentucky v. Indiana*, 281 U. S. 163, 166-167 (1930).

The same urgency exists in passing upon the validity of a compact. If a state could escape its obligations under a compact by a ruling of its courts that its ex-

cution was *ultra vires*, the exercise of the power of Congress under the compact clause would be nullified.

In deciding the validity of a contract between private parties, the court must pass upon the legality of the act of each party in signing the same; for example, whether a party signing was *sui juris*, or whether execution by an agent was in excess of the latter's authority.

So in order to determine the validity of this compact, it becomes necessary for this court to decide the legality of the act of West Virginia in executing such compact and to decide whether the state, in view of the provisions of its constitution lacked capacity to enter into the compact.

Approval by Congress is not merely a condition precedent to the validity of a contract among states.

The effect of the approval of a compact by Congress was determined by this court in

Virginia v. West Virginia, 246 U. S. 565 (1918).

The legislature of West Virginia failed to levy taxes to provide for the payment of its share of the debt and the state defaulted in payment. The State of Virginia filed an original suit in this court to compel performance of the compact by the State of West Virginia.

West Virginia set up in defense that it could not be controlled by judicial process or be compelled to levy a tax to create a fund to pay a judgment in favor of Virginia.

This court sustained the compact and the power of this court to enforce the same.

In the opinion, Chief Justice White said:

* * * * *

"The vesting in Congress of complete power to control agreements between States, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that *Congress*, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements, and therefore *was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power*. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, *to see to its enforcement.*" * * * (601)

* * * it further follows, as we have already seen, that, by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States. Indeed, the argument that the recognition of such a power in Congress is subversive of our constitutional institutions from its mere

statement proves to the contrary, since at last it comes to insisting that any one State may, by violating its obligations under the Constitution, take away the rights of another and thus destroy constitutional government. * * * * (Italics supplied) (602).

In this opinion this court states that the constitution confers upon Congress

"ultimate power of final agreement"
in regard to compacts between states.

The opinion also declares that this power of final agreement "was withdrawn from state authority and brought within the federal power".

After "the ultimate power of final agreement" has been exercised by Congress, the compact must necessarily be final and complete. The significance of the words "final agreement", is that no state may alter or rescind the compact or withdraw therefrom. Whether the effort to withdraw is made by action of the people by constitutional amendment or by decision of the highest court of the state, is immaterial. Otherwise, the people of the state or its courts may at any time completely nullify the effect of the act of Congress in approving the compact.

The compact itself contains no clause permitting a state or states to amend the compact or to withdraw therefrom.

West Virginia, by Act of its Legislature, ratified and approved the Ohio River Valley Water Sanitation Compact on March 11, 1939 (R. 1, 2).

Congress approved the compact on July 11, 1940 (Appendix to petitioner's brief, pp. 38, 45).

The compact was subsequently ratified by the states of Pennsylvania and Virginia.

Just as in the case of contracts between private parties, a state, after it has executed a compact, is under a legal obligation to do nothing that will impair its ability or disability to cooperate with other states and to perform the obligations which it and the other states have assumed.

Congress may be interested just as much in the performance, as in the execution, of a compact between states.

In addition, other states have acquired rights and incurred obligations in reliance upon the execution of this compact by West Virginia and its approval by Congress. West Virginia cannot now rescind its act of execution or void its compact by a decision of its appellate court.

This court has held that a compact approved by Congress becomes a law of the United States. If this be true, a compact approved by Congress becomes a law which each signatory state must obey. Such a law cannot be repealed or avoided by act of the people or courts of a state.

In *Pennsylvania v. Wheeling and Belmont Bridge Company*, 54 U. S. (13 How.) 518, this court said of a compact between Kentucky and West Virginia with respect to navigation of the Ohio River:

Argument.

"This Compact, by the action of Congress, has become a law of the Union." (566)

The sentence quoted was repeated by Mr. Justice Holmes in *Wedding v. Miller*, 192 U S. 573, 583 (1904); *Missouri v. Illinois*, 200 U. S. 496, 519 (1906).

III.

THE STATE OF WEST VIRGINIA DID NOT SURRENDER ITS POLICE POWER BY JOINING IN THIS INTERSTATE COMPACT.

The compact deals with the problem of pollution in an interstate stream. One state by separate action cannot effectively control or lessen pollution in such a stream. To accomplish this result will require joint action by all of the states situate in the Ohio River Basin.

In order to exercise more effectively its police power in lessening pollution in this stream, the State of West Virginia acts jointly with other states through which the stream flows.

In doing this, the state is exercising, not surrendering, its police power. It joins with other states in exercising its police power because a separate act of police legislation by its legislature would be ineffectual. The result—the lessening of pollution—can be accomplished only by the action of other states who join with West Virginia.

In order to exercise its police power a state need not act in complete isolation. It may act jointly with other states. Thus numerous agreements and compacts

have been entered into by states to establish and enforce standards for safety and efficiency of highways. These subjects are clearly police legislation.

Perhaps no powers of the federal government are less capable of delegation than its great war powers. Yet in its foreign wars the United States has entered into alliance with other nations to set up joint staffs and joint control of the war effort.

Furthermore, the compact sets up definite minimum standards for regulation of pollution (Art. VII, Page 42 of Appendix of petitioner's brief). By ratifying the compact, the legislature of West Virginia definitely and separately adopted these standards. Its act in so doing was clearly an exercise of its own police power and is not controlled in any degree by the action of any other state which joined in the compact.

As has been already stated, the compact itself set up the minimum standards for controlling pollution. All that was left to the Commission was the authority to administer such standards (Art. VI, pp. 41-42 of Appendix to petitioner's brief). The standards prescribed are more definite and particular than those in other legislation which have been held by this court.

Article VII of the Compact provides:

"Nothing in this compact shall be construed to limit the powers of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction."

Argument.

The police power of West Virginia, therefore, is not limited. Additional and more drastic laws may still be enacted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1950

No. 147.

THE STATE OF WEST VIRGINIA, AT THE RELATION
OF DR. N. H. DYER, ET AL.,

Petitioner,

vs.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST
VIRGINIA,

Respondent.

BRIEF OF THE STATES OF OHIO, INDIANA, ILLINOIS, KENTUCKY, PENNSYLVANIA, AND NEW YORK, AS AMICI CURIAE, IN SUPPORT OF PETITIONER.

This brief is filed on behalf of the states of Ohio, Indiana, Illinois, Kentucky, Pennsylvania and New York, as amici curiae, by the chief legal officers of these states under authority of Rule 27, paragraph 9, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE.

The petition for a writ of certiorari which has been filed in this case contains a full statement of the facts involved and the proceedings in the court below. Inclusion of a similar statement in this brief would be repetitious and would serve no useful purpose. Therefore, petitioner's statement of the case will be adopted for the purposes of this brief, supplemented, however, by emphasizing the fact that each of the states on whose behalf this brief is being filed ratified and enacted into law the Ohio River Valley Water Sanitation Compact in complete reliance upon the ability of each of the other signatories, including the state of West Virginia, to do likewise. Petitioner's statement of the case should be further supplemented by calling the attention of the court to the fact that, since the Ohio River Valley Water Sanitation Compact became effective, each of the states on whose behalf this brief is being filed has undertaken to carry out its respective responsibilities thereunder and has made its proportionate financial contribution to its administration in full expectation that each of the other signatories, including the state of West Virginia, could and would do likewise.

QUESTIONS PRESENTED.

1. Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.
2. If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by

the provisions of its own constitution, does Article X, Section 4, of the Constitution of the state of West Virginia restrict such power?

3. If Article X, Section 4 of the Constitution of the state of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the Ohio River Valley Water Sanitation Compact subject the state of West Virginia to any obligation in violation of the above mentioned article and section of its constitution?

4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the legislature of the state of West Virginia resulted in an unconstitutional delegation of police power.

ARGUMENT.

1. Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.

The judgment of the court below, in holding that West Virginia's ratification of the Ohio River Valley Water Sanitation Compact was a violation of a provision of the constitution of that state which prohibited the state from contracting a debt, would, if undisturbed, virtually prohibit that state from entering into any interstate compact whatever since it is only in the rarest of cases that a party to such compact would not be called upon to bear a fair portion of the expense involved therein.

It is not believed possible for a state thus to cast away one of its most important attributes of sovereignty, for the history of interstate compacts clearly shows their essential nature as such. They were utilized during the colonial period with the assent and approval of the Crown. During the period following the Declaration of Independence interstate compacts were utilized by the several states with the consent of the Continental Congress. It seems beyond argument that the inclusion of the compact clause in the Constitution of the United States was not only intended to place a limitation on the powers of the states to exercise this attribute of sovereignty but was also intended to affirm the power, in this respect, which the states had theretofore possessed, subject to the sole and exclusive limitation that the Congress of the United States consent to its exercise, such consent being substituted for that of the King, and, later, that of the Continental Congress.

It is to be remembered that under Article VI, Clause 2, of the Constitution of the United States the Federal Constitution and all laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Accordingly, when Public Resolution No. 104, Seventy-Fourth Congress, which gave assent to the compact hereunder consideration, provided that "no such compact or agreement shall be binding or obligatory upon any state a party thereto unless and until it had been approved by the legislatures of each of such states whose assent is contemplated by the terms of the compact or agreement and by the Congress," it necessarily followed that the method thus prescribed for ratification of the compact by the states was the only proper one by which such ratification could be made effective, and that such legislative ratification became the only condition precedent to its becoming effective. It further follows that such congressional act, under Article VI, Clause 2, became the supreme law of the land, anything to the contrary in the Constitution of West Virginia notwithstanding. See **Hawke v. Smith, Secretary of State of Ohio** (1920), 253 U. S., 221, 64 L. Ed., 871.

This conception of the supremacy of federal law in the matter of interstate compacts is supported by the following language of Chief Justice White in **Virginia v. West Virginia** (1918), 246 U. S., 565, 62 L. Ed., 883, at pages 601 and 602 of the U. S. Report, where the scope and effect of Article I, Section 10, Clause 3, was stated in the following language:

"The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved; clearly rested upon the con-

ception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. * * *

Any rule which would permit a state of the Union to place a constitutional restriction upon the power of its legislature to ratify an interstate compact would jeopardize the validity of virtually all such compacts now in existence, and would have the practical effect of virtually nullifying the inherent power to make such compacts which was expressly reserved to the states by Article I, Section 10, Clause 3. So considered, it can only be concluded that such a rule violates the Constitution of the United States and cannot be upheld.

2. If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by the provisions of its own constitution, does Article X, Section 4, of the Constitution of the state of West Virginia restrict such power?

In the event that this court should hold that the provisions of a state constitution can properly limit the power of a state to enter into interstate compacts then it becomes necessary to a determination of this cause to decide whether Article X, Section 4, of the Constitution of West Virginia does in fact limit such power. In this respect this court is not bound by the interpretation of this constitutional provision by the Supreme Court of Appeals of West Virginia under the rules established in **Hinderlider v. LaPlata River & Cherry Creek Ditch Co.** (1938), 304 U. S., 92, 110, Note 12, 82 L. Ed., 1202, 1212, 58 S. Ct., 803, and in **Kentucky v. Indiana** (1930), 281 U. S., 163, 74 L. Ed., 784.

The power of a state to make compacts with other states of the Union is an inherent power which the states possessed prior to admission to the Union under the United States Constitution. Upon the formation of the Federal Union, the Federal Constitution expressly guaranteed the continuation of such power in the several states, subject only to the requirement that it be exercised only with the consent and approval of Congress.

Article X, Section 4, of the West Virginia Constitution does not expressly deny or limit this inherent power. If it contains any such limitation of the power it must be by implication.

Article X, Section 4, purports to be only a limitation on the power of the legislature to regulate the fiscal affairs of the state. The idea that a provision relating to the ordinary fiscal affairs of the state was ever intended by the framers of this constitution or the people who adopted it virtually to deny to the state so important an attribute of sovereignty is one which strains the credulity of informed men, especially in view of the all too well known jealousy of sovereigns in guarding their powers.

Having in mind the importance of the power of the state in this respect as an attribute of sovereignty and considering the obviously narrow intended scope of Article X, Section 4, the conclusion that this constitutional provision, by implication, virtually destroys such attribute of sovereignty is indeed difficult to reach.

3. If Article X, Section 4 of the Constitution of the State of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the Ohio River Valley Water Sanitation Compact subject the state of West Virginia to any obligation in violation of the above mentioned article and section of its constitution?

The prohibition of Article X, Section 4, of the Constitution of West Virginia against the contracting of any debt is subject to certain exceptions enumerated therein. Among these is "to meet casual deficits in the revenue."

The meaning of "casual deficits in the revenue" was considered by the Supreme Court of Appeals of West Virginia in **Dickinson v. Talbott** (1933), 114 West Virginia, 1, 170 S. E., 425. In that case the court had under consideration an attack on a legislative act authorizing a bond issue in the amount of five million dollars on the ground that it violated the provisions of Article X, Section 4, of the state constitution. In holding that act valid despite the constitutional limitation on the incurrence of a debt, the court, speaking of the effect of this constitutional provision as applicable to legislative control of the state's fiscal affairs said, *inter alia*:

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"The state's constitutional requirements are for the preservation of the state and the maintenance of its integrity and for the protection of the people. Constitutional limitations must not be so construed as to be subversive of their very purpose. * * *

Page 7

"Apropos of both sections 4 and 5, Article X, West Virginia Constitution, it is not to be considered that the framers of our Constitution or the people of the state in ratifying and approving the same, meant to place barriers in the path of the state officials and the legislators, so circumscribing the fiscal affairs of the state as to create impossibility of escape from embarrassing situations."

Page 8

"The state of West Virginia is sovereign save only as it has relinquished certain prerogatives to the federal government. In the exercise of the sovereign

attribute of enacting laws, the legislative power is inherent; therefore, in construing an act of the state legislature, reference must be had to the state and federal constitutions, not in search of a grant of power, but to ascertain if there is a limitation or restriction of power. * * * In the acts under consideration the legislature, in our judgment, has not violated any constitutional limitation of its authority but has properly acted under its broad and plenary power to provide for the welfare of the state."

It is easy to conclude that if these rules of constitutional interpretation had been applied in the instant case, the court below could not have formed the decision which it did.

The conclusion of the court below that the ratification of the compact here under examination did purport to create a debt in violation of Article X, Section 4, must necessarily have been based on a consideration of the provisions of the compact itself. The only references made in the compact to fiscal affairs appear in Articles V and X, which read in part as follows:

"Article V

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof."

"The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be duly constituted for that purpose."

"The Commission shall not incur any obligation of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission

pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof."

"Article X.

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the governors of the signatory States, one-half of such amount to be prorated among the several states in proportion to their population within the District at the last preceding Federal census, the other half to be prorated in proportion to their land area within the District."

As to Article V, the language clearly evinces a deliberate effort to renounce any notion of contravening the constitutional requirements, in fiscal affairs, of any of the signatory states. Clearly, the court below could not have had anything in this article in mind in reaching the conclusion it did.

There is, however, in Article X, what purports to be an agreement among the signatory states for the sharing of expenses of the project being established; and what purports to be an agreement to appropriate funds therefor.

Since it is virtually a universal rule that a particular legislature cannot be bound in advance to appropriate funds for particular purposes, it would appear that it is this provision in Article X of the compact which led the court below to reach the conclusion it did.

Did this language of Article X actually create a debt within the meaning of Article X, Section 4, of the Constitution of West Virginia? Since a particular legislature cannot be legally bound in advance to make any particular appropriation of funds it is difficult to see how a "debt" could be created by such an "agreement." The practical interpretation to be given to such an "agreement" is that the executive officials of the several signatory states agreed

to use their influence in urging such appropriations by future legislatures to the end that necessary funds would be provided.

The legal position of a signatory state under the language of Article X of the compact is no different than it is when the legislature of such state authorizes the construction of a state institution or the creation of a new department of the government. A moral obligation to provide funds in the future to maintain and support such institution or department certainly would be present even though no obligation might exist. In actual practice every state government in the Union, and the federal government as well, operates continually on this basis, for governments as well as individuals must necessarily depend heavily on moral as well as legal obligations. In this respect it can truly be said that it is the moral quite as often as the legal obligation which gives life to the promises which governments and men live by.

Viewed in this light, the provisions of the compact and the West Virginia statute ratifying it and enacting it into law can and should be construed so as to uphold their constitutionality.

4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the legislature of the state of West Virginia resulted in an unconstitutional delegation of police power or of legislative authority.

The judgment of the court below, in holding that the ratification and enactment into law of the compact was an invalid delegation of the police power of the state was obviously based on what was thought to be an improper attempt to authorize the Ohio River Valley Water Sanitation Commission to:

(a) Require a minimum treatment of sewage and industrial wastes discharged into water of the Ohio drainage basin, and

(b) Issue orders to citizens of the signatory states to compel abatement of any discharge of sewage or industrial waste in violation of the compact. Such authority is given to the commission in Article VI and IX of the compact.

However, it is provided in Article IX of the compact that no such order shall be effective against any corporation, person or entity within a state unless and until it receives the assent of not less than a majority of the commissioners of such state.

Under the provisions of Section 2 of House Bill No. 369, passed March 11, 1939, the legislative act by which West Virginia ratified this compact, two of the commissioners representing that state are to be appointed by the governor with the advice and consent of the Senate; and the third is to be state commissioner of health, by virtue of his office.

Accordingly, control of the power of the Ohio River Valley Water Sanitation Commission to issue orders affecting West Virginia citizens is vested in administrative officials of that state quite as fully as though that state, acting alone, had created a commission to carry out the purposes for which the compact was made.

Nor is it improper, under West Virginia law, for the legislature to create such an administrative board or commission and to clothe it with rule-making power, provided the legislature prescribes the policy and aims of the project concerned and establishes standards for guidance of the administrative body. This conclusion is clearly supported by the views of the minority of the West Virginia court as expressed in the dissenting opinion filed below in this case. In **State v. Bunner** (1943), 126 W. Va., 280, 27 S. E.

(2d), p. 823, the Supreme Court of Appeals of West Virginia said:

"A statute requiring the public health council to adopt regulations to provide clean and safe milk and fresh milk products, and providing that the violation of regulations of the council which are reasonable and not inconsistent with law shall be a misdemeanor, is not unconstitutional as an improper delegation of legislative authority."

To the same effect is the rule stated in **Rifehart v. Flying Service** (1940), 122 W. Va., 392, 9 S. E. (2d), 521.

While perhaps a good case could be made for the proposition that the exercise by a state of its inherent right of compact with other states of the Union must normally be expected to involve the surrender of some degree of sovereignty for the common good, just as the nation surrenders some degree of sovereignty in concluding a treaty with a foreign state, it is not necessary in the case at bar to pursue this line of reasoning. In this case the language of the compact clearly evinces a deliberate and studied attempt on the part of its framers to avoid the least encroachment on the sovereignty of the signatory states. Indeed, there may be some question whether it has not leaned too far in this direction to permit effective attainment of its objectives. Certainly it should not be struck down by the courts for encroachment on state sovereignty when that sovereignty is so clearly acknowledged and guaranteed by the terms of the compact itself.

CONCLUSION.

For the foregoing reasons the judgment of the court below should be reversed.

Respectfully submitted,

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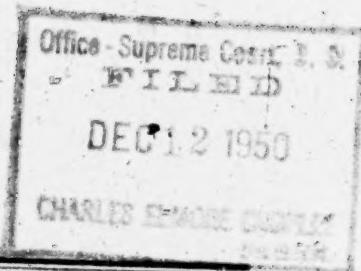
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Supreme Court of the United States

OCTOBER TERM, 1950

NO. 147

**THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER, et al., etc., Petitioners,**

v.

EDGAR B. SIMS, Auditor of the State of West Virginia.

SUPPLEMENTAL MEMORANDUM.

**CHARLES J. MARGIOTTI,
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SUPPLEMENTAL MEMORANDUM.

**IN THE ABSENCE OF A PROVISION TO THE CONTRARY,
EXPRESS OR IMPLIED, A STATE MAY NOT WITHDRAW FROM A
COMPACT AT WILL.**

The compact in this case contains no express provision as to its duration or termination or the withdrawal of a state. While we have found no decision of this court as to the right of withdrawal, it is our position that a state may not withdraw without the consent of all of the parties to the compact. This is the rule in private contracts. It is also the rule in treaties between nations:

Thus in McNair on The Law of Treaties (1938), the rule is stated:

"The normal basis of approach adopted in the United Kingdom towards a treaty is that it is intended to be of perpetual duration and incapable of

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unilateral determination, unless, expressly or by implication, the treaty contains a right of unilateral termination or some other provision for its coming to an end. There is nothing juridically impossible in the existence of a treaty creating obligations which are incapable of termination except by the agreement of all parties." (p. 351)

The subject matter of the compact in this case and the surrounding circumstances make it clear that a right of withdrawal was not intended and should not be implied. The compact sets up a program for the purification of streams—the lessening of pollution from sewerage and industrial wastes.

Such a program cannot be taken up one day and dropped the next. It will require at least a period of years for its successful consummation.

Furthermore, if one state should withdraw and thereafter permit the pollution of a stream, the people of the states below would suffer and the efforts of those states to lessen pollution would be largely defeated.

In order to implement the program it will be necessary to conduct an investigation to ascertain the sources of pollution. Extensive studies will have to be made to determine the best methods of eliminating pollution. Scientific and engineering experts will have to be employed to design plants for the disposal of sewerage and for the consumption or treatment of industrial waste. A municipality will have to provide the finances, perhaps by a vote of the people authorizing a bond issue, to pay the cost of the new installation. Industries too will have to invest substantial sums in equipment or plants for

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the disposal or treatment of chemicals or other industrial wastes.

Pennsylvania is particularly interested in the continuance of West Virginia in this compact. No controversies have arisen between the two states. The only issue is a legal question.

The Statement in the brief filed by Pennsylvania in this case indicates that the head waters of the Monongahela River and much of the stream itself lie in West Virginia and the waters flow through Pennsylvania. If Pennsylvania should enforce the installation of the purification process, and West Virginia should not do this, industries in West Virginia would have a comparative advantage over Pennsylvania. The West Virginia industrialist would not have to include the expenses of purification in its cost of production, nor would it have the additional capital investment in machinery and equipment for consumption or elimination of wastes. If West Virginia should withdraw, the compact would have much less value to Pennsylvania. Most of the other states lie down stream from Pennsylvania. Virginia and New York have a comparatively small amount of water shed which drains into the Ohio River Basin.

After the program is completely implemented, it will not produce a permanent or static condition in which pollution is perpetually eliminated. Continued enforcement of the compact will be necessary in order to preserve the gains accomplished by it.

We submit that neither in the language of the compact nor in the surrounding circumstances or the subject

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matter of the compact is there anything to support an implication of a right to withdraw or terminate.

If it be argued to the contrary, we submit—

I.

IF IMPLICATION IS RESORTED TO, THE TREATY WOULD ENDURE FOR A REASONABLE TIME IN THE LIGHT OF ALL THE CIRCUMSTANCES AND THE NATURE OF THE SUBJECT MATTER OF THE COMPACT.

The same limitation would be imposed on the right of withdrawal.

In *McNair, on The Law of Treaties*; the rule as to implied duration or right of withdrawal is stated as follows:

"Just as there is nothing juridically impossible in the existence of a treaty which is incapable of termination except by consent of all parties, so also there is nothing juridically impossible in the existence of an implied term giving a party the right to terminate it unilaterally by denunciation. It is a question of the intention of the parties which can be inferred from the terms of the treaty, the circumstances in which it was concluded, and the nature of the subject-matter. (pp. 362-363)

"One circumstance which would very much strengthen the general presumption of perpetual duration would be that the treaty in question is in part executed and in part executory." (p. 363)

The principle of this last sentence is applicable in this case. The work of implementing the compact will not precede *pari passu* or be synchronized in all of the

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states which are parties. After one state has completed wholly or partially its part of the program, the implication should be clear that another state was not permitted to withdraw.

It may be argued that a different rule applies to *commercial treaties*. The compact in this case, however, is obviously not a *commercial* compact. Its provisions do not call for the passage of a single boat or article of trade over any stream. The compact requires purification of a stream even though no commercial use is made of it. The elimination or lessening of pollution is intended to make the waters of the stream useable for human consumption and recreation.

In McNair, on *The Law of Treaties*, the question of commercial treaties is discussed as follows:

"It is believed that the view now held is that, in the case of a treaty embodying a purely commercial bargain between the parties, the existence of an implied right of denunciation upon giving reasonable notice can readily be inferred from the very nature of the treaty on the ground that it requires revision from time to time in order to bring it into harmony with changing conditions. But in fact the United Kingdom Government has never yet claimed to exercise this right. (p. 367)

"It must, however, be noted that the opinion above stated as to the terminability of commercial treaties containing no express provision for denunciation relates only to commercial treaties *stricto sensu*, that is, treaties embodying a bilateral bargain on such matters as reciprocal freedom of commerce and navigation, traffic in transit, tariffs,

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most-favored-nation treatment, entry and residence of nationals and immunity from military duties and requisitions, registration of companies, consuls, etc." (p. 368)

"When a treaty does more than this and provides for a special regime, such as the conventions between the United Kingdom and the United States of America relating to the rights of the latter State and its citizens in the British Mandated Territories or where a *multi-partite treaty creates in a particular area a regime, apparently intended to be permanent*, of commercial equality for all nations, there is little doubt that other considerations would prevail and that any inference of terminability by unilateral denunciation would be negatived. (p. 368) (Emphasis added)

See also *Brierly, The Law of Nations* (4th ed.), pp. 236, 239-240.

The rule in regard to the duration and terminability of private contracts is stated in *1 Williston on Contracts*, Sec. 389. We call attention to the concluding sentence of this Section 1, as follows::

"* * * Nevertheless, not infrequently promises requiring continuing performance (other than contracts of service) have been interpreted as requiring performance for a reasonable time, or until terminated by a reasonable notice. All the circumstances of each case must be considered in reaching a conclusion. Especially if consideration for such a promise is partly executed a court will be reluctant to hold that the promise is determinable at the promisor's pleasure."

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The compact in this case is a public contract between sovereign states, and the rule as to treaties, rather than the rule as to private contracts, should be applied.

However, we submit, that under either rule the compact in this case may not be terminated until the program for the abatement of pollution has been accomplished. That is the sole and indivisible purpose of the compact.

II.

THIS COURT MUST DETERMINE FOR ITSELF WHETHER A COMPACT EXISTS BETWEEN THE STATES, INCLUDING WEST VIRGINIA,

Numerous decisions holding that this court will determine for itself the existence and construction of a contract, in order to determine whether its obligation has been impaired, are collected in 6 U. S. Supreme Court Digest, Courts, Secs. 848, 849, 849.5.

Under these decisions this court "will examine for itself the existence and meaning of the contract as well as the relation of the parties and the circumstances of its execution" (*Rapid Transit Corp. v. New York*, 303 U. S. 573, 593 (1938)).

It is equally important that this court determine for itself the existence of a compact with a particular state, after such compact has been approved by Congress and in view of the fact that Congress "was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power" (*Virginia v. West Virginia*, 246 U. S. 565 (1918)).

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The approval of Congress presumably is made only after that body determines that a compact has been executed by the signatory states.

If this act of Congress is not political, or is not conclusive on everyone, this court must determine whether the compact has been validly executed by the states and approved by Congress.

We again refer to the cases cited on pages 15-16 of our brief in which this court stated that "this Compact, by the action of Congress, has become a law of the Union".

If this compact is a law of the United States, then the rule applied in determining the duration of a statute should govern—that an act, if not limited in duration, continues in force until it is repealed (50 Am. Jur., Statutes, Sec. 513). In this case the compact would be in force until repealed by an Act of Congress and an act of the Legislature of each of the signatory states, or at least until Congress withdrew its approval.

Respectfully submitted,

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